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THE CODE

OF CIVIL PROCEDURE,

AND OTHER

GENERAL STATUTES OF OREGON.

16
2006

ENACTED BY THE LEGISLATIVE ASSEMBLY, AT THE
SESSION COMMENCING

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Code Commissioners:
M. P. DEADY, A. C. GIBBS,
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Civ. Proc
1863

AN ACT

TO PROVIDE A CODE OF CIVIL PROCEDURE.

The Legislative Assembly of the State of Oregon do enact, as follows:

ACTIONS AT LAW IN COURTS OF RECORD.

CHAPTER I.

TITLE I.—*Of the form of Actions.*
TITLE II.—*Of the time of their commencement.*
TITLE III.—*Of the parties thereto.*
TITLE IV.—*Of the place of trial.*
TITLE V.—*Of the manner of their commencement.*
TITLE VI.—*Of the pleadings.*
TITLE VII.—*Of the complaint.*
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TITLE XII.—*Of mistakes in pleadings, and amendments.*
TITLE XIII.—*Of arrest and bail.*
TITLE XIV.—*Of the recovery of personal property.*
TITLE XV.—*Of attachment.*

TITLE I.

Of the forms of actions.

SEC. 1. Distinction between forms of actions abolished.
2. Parties thereto, how designated.

SECTION 1. The distinction heretofore existing between forms of actions at law is abolished, and hereafter there shall be but one form of action at law, for the enforcement of private rights or the redress of private wrongs.

SEC. 2. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant,

TITLE II.

Of the time of their commencement.

SEC. 3. Time of commencing actions in general.
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5. Within ten years.
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16. Exception when defendant is out of state, or concealed.
17. Exceptions as to persons under disabilties.
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20 Time of stay, by injunction, or statutory prohibition, to be deducted.
21. Provision when judgment has been reversed.
22. Disability must exist, when right of action accrued.
23. Where several disabilities, limitation does not attach, till all removed.
24. Acknowledgments or new promise must be in writing.
25. Limitation to commence from time of partial payment.
26. No cause of action barred by statute of state where it accrued, is actionable.

SEC. 3. Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except where, in special cases a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, shall only be taken by answer, except as otherwise provided in section 66.

SEC. 4. The periods prescribed in the preceding section for the commencement of actions, shall be as follows:

Within twenty years:

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

SEC. 5. Within ten years:

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States;

2. An action upon a sealed instrument.

Sec. 6. Within six years:

1. An action upon a contract or liability, express or implied, excepting those mentioned in section 5;

2. An action upon a liability created by statute, other than a penalty or forfeiture;

3. An action for waste or trespass upon real property;

4. An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof;

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

Sec. 7. Within three years:

1. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape;

2. An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state, except where the statute imposing it prescribes a different limitation.

Sec. 8. Within two years:

1. An action for libel, slander, assault, battery, or false imprisonment;

2. An action upon a statute for a forfeiture or penalty to the state.

Sec. 9. Within one year:

An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

Sec. 10. An action upon a statute for a penalty given in the whole or in part to the person who will prosecute for the same, shall be commenced within one year after the commission of the offence; and if the action be not commenced within one year by a private party, it may be commenced within two years thereafter, in behalf of the state, by the district attorney of the county where the offence was committed, or is triable.

Sec. 11. An action for any cause not hereinbefore provided for, shall be commenced within ten years after the cause of action shall have accrued.

SEC. 12. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side; but whenever a period of more than one year shall elapse, between any of a series of items or demands they are not to be deemed such an account.

SEC. 13. The limitations prescribed in this chapter, shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties.

SEC. 14. An action shall be deemed commenced as to each defendant, when the complaint is filed and the summons served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him.

SEC. 15. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the complaint is filed, and the summons delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county, in which the defendants or one of them usually or last resided; or if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt shall be followed by the first publication of the summons, or the service thereof within sixty days.

SEC. 16. If when the cause of action shall accrue against any person, who shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the state, or the time of his concealment; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.

SEC. 17. If a person entitled to bring an action mentioned in this title, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either:

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life; or
4. A married woman;

The time of such disability shall not be a part of the time limited for the commencement of the action, but the period within which the action shall be brought, except the actions mentioned in section 4, shall not be extended more than five years by any such disability, except infancy; nor shall it be extended in any case longer than one year after the disability ceases.

Sec. 18. If a person entitled to bring an action, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his personal representatives after the expiration of the time, and within one year from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representatives after the expiration of that time, and within six months after the issuing of letters testamentary or of administration.

Sec. 19. When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action.

Sec. 20. When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition, shall not be a part of the time limited for the commencement of the action.

Sec. 21. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die, and the cause of action survives, his heirs or personal representatives, may commence a new action within one year after the reversal.

Sec. 22. No person shall avail himself of a disability unless it existed when his right of action accrued.

Sec. 23. When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

SEC. 24. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

SEC. 25. Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

SEC. 26. When the cause of action has arisen in another state, territory or country, between non-residents of this state, and by the laws of the state, territory or country where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state.

TITLE III.

Of the parties thereto.

SEC. 27. Action to be prosecuted in the name of the real party in interest.
28. Assignment of thing in action not to prejudice defence.
29. Executor, or trustee may sue without the person beneficially interested.
30. When a married woman is a party, actions by and against.
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32. Guardian how appointed.
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36. Different parties to commercial paper, or other obligation may be sued in one action.
37. When action not to abate.
38. When action for wrong not to abate.
39. When third person may be substituted in place of defendant.
40. When court to decide controversy, or order other defendants to [be] brought in.

SEC. 27. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section 29, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

SEC. 28. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of the assignment: but this section shall not apply to a negotiable promissory note or bill of exchange transfered in good faith and upon good consideration before due.

SEC. 29. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section.

SEC. 30. When a married woman is a party, her husband shall be joined with her, except that,

1. When the action concerns her separate property she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next friend.

SEC. 31. When an infant is a party, he shall appear by guardian, who may be appointed by the court in which the action is brought, or by a judge thereof, or a county judge.

SEC. 32. The guardian shall be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relation or friend of the infant.

2. When the infant is defendant, upon an application of the infant, if he be of the age of fourteen years, and apply within fifteen days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relation or friend of the infant.

SEC. 33. A father, or in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward.

SEC. 34. A father, or in case of his death or desertion of his family, the mother may maintain an action as plaintiff, for the seduction of a daughter, and the guardian for the seduction of a ward, though the daughter or ward be not living with, or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

SEC. 35. An unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in section 34, shall be a bar to an action by such unmarried female.

SEC. 36. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes may, all or any of them, be included in the same action, at the option of the plaintiff.

SEC. 37. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest.

SEC. 38. An action for a wrong, shall not abate by the death of any party, after a verdict has been given therein, but the action shall proceed thereafter in the same manner as in cases where the cause of action survives.

SEC. 39. In any action for the recovery of specific personal property, if a third person demand of the defendant the same property, the court in its discretion, on motion of the defendant, and notice to such person and the adverse party, may, before answer, make an order discharging the defendant from liability to either party, and substitute such person in his place as defendant. Such order shall not be made but on the condition that the defendant deliver the property or its value to such person as the court may direct, nor unless it appears from the affidavit of the defendant, filed with the clerk by the day he is otherwise required to answer, that such person makes such demand without collusion with the defendant. The affidavit of such third person as to whether he makes such demand of the defendant may be read on the hearing of the motion.

SEC. 40. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in.

TITLE IV.

Of the place of trial.

SEC. 41. *What actions to be tried where the subject, or some part is situated.*
42. What actions to be tried where the cause, or some part, arose.
43. What actions to be tried where the defendant resides, or may be found.
44. When court may change place of trial.
45. Same subject.
46. Transcript and papers to be sent to clerk of court to which cause is transferred.
47. Who to pay costs, same not to be taxed.
48. When, if transcript not transmitted, court may vacate order.
49. When change of venue deemed complete.

SEC. 41. Actions for the following causes shall be commenced and tried in the county in which the subject of the action, or some part thereof is situated:

1. For the recovery of real property, or an estate or interest therein, or for injuries to real property;

2. For the recovery of any personal property distrained for any cause.

SEC. 42. Actions for the following causes shall be commenced and tried in the county where the cause, or some part thereof, arose:

1. For the recovery of a penalty or forfeiture imposed by statute; except that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be commenced and tried in any county bordering on such lake, river, or stream, and opposite to the place where the offence was committed:

2. Against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office; or against a person who, by his command, or in his aid, shall do anything touching the duties of such officer.

SEC. 43. In all other cases, the action shall be commenced and tried in the county in which the defendants or either of them reside, or may be found, at the commencement of the action; or if none of the parties reside in this state, the same may be tried in any county which the plaintiff may designate in his complaint.

SEC. 44. The court may change the place of trial, on the motion of either party to the action, when it appears from the affidavit of such party; either,

1. That the action has not been commenced in the proper county; or,

2. That the judge is a party to, directly interested in the event

of the action, or connected by consanguinity or affinity within the third degree, with the adverse party, or those for whom he prosecutes or defends; or,

3. That the judge or the inhabitants of the county are so prejudiced against the party making the motion, that he cannot expect an impartial trial before said judge, or in said county as the case may be; or,

4. That the convenience of witnesses and the parties would be promoted by such change; and,

5. That the motion is not made for the purpose of delay.

SEC. 45. The motion for a change of the place of trial, cannot be made, or allowed in any action, until after the cause is at issue on a question of fact only. If the motion be allowed, the change shall be made to the county where the action ought to have been commenced, if it be for the cause mentioned in subdivision one of section 44, and in other cases to the most convenient county where the cause alleged does not exist. Neither party shall be entitled to more than one change of the place of trial, except for causes not in existence when the first change was allowed.

SEC. 46. When the place of trial has been changed the clerk shall forthwith transmit to the clerk of the proper court, a transcript of the proceedings in such cause with all the original papers filed therein, having first made out and filed in his own office authenticated copies of all such original papers.

SEC. 47. The costs of such change of venue shall be paid by the applicant therefor, and not taxed as a part of the costs of the case, and the clerk may require payment of such costs before the transcript and papers shall be transmitted as aforesaid.

SEC. 48. If such transcript and papers, be not transmitted to the clerk of the proper court within the time prescribed in the order allowing the change, and the delay be caused by the act or omission of the party procuring the change; the adverse party, on motion to the court or judge thereof, may have the order vacated, and thereafter no other change of the place of trial shall be allowed to such party.

SEC. 49. Upon the filing of the transcript and papers with the clerk of the court to which the cause is transferred, the change of venue shall be deemed complete, and thereafter the action shall proceed as though it had been commenced in that court.

TITLE V.

Of the manner of their commencement.

Sec. 50. How actions commenced.
51. Summons, requisites of, when defendant to appear and answer.
52. Summons to contain notice of what plaintiff demands.
53. Summons, by whom served and when and where returned.
54. Summons, how served, and upon whom.
55. When order for publication of summons may be made.
56. Publication how made, personal service out of the State equivalent thereto.
57. When defendant may be allowed to defend after judgment.
58. When the summons is returned not found, how plaintiff may proceed.
59. When summons not served on all the defendants.
60. Proof of service of summons.
61. When court acquires jurisdiction.

Sec. 50. Actions at law shall be commenced by filing a complaint with the clerk of the court, and the provisions of sections 14 and 15, shall only apply to this subject for the purpose of determining whether an action has been commenced within the time limited by this code. At any time after the action is commenced the plaintiff may cause a summons to be served on the defendant.

Sec. 51. The summons shall contain the name of the court in which the complaint is filed, the names of the parties to the action, and the title thereof. It shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to appear and answer the complaint, or judgment for want thereof will be taken against him.

1. If the defendant be served within the county in which the action is commenced, ten days before the term of court next following such service, or if in any other county in the state twenty days before such term, he shall appear and answer the complaint, on the first day thereof.

2. If he be served less than ten days before the term of court next following such service, within the county in which the action is commenced, or less than twenty days in any other county, he shall appear and answer the complaint on the first day of the second term next following such service.

Sec. 52. There shall also be inserted in the summons a notice, in substance as follows:

1. In any action for the recovery of money or damages only, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

2. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein.

SEC. 53. The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or by the court or judge thereof, in which the action is commenced. The summons shall be returned to the clerk with whom the complaint is filed, by the first day of the next term after its delivery to the officer or other person for service, with proof of such service, or that the defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail. The sheriff, or other person to whom the summons is delivered, shall endorse thereon the date of such delivery.

SEC. 54. The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, as follows:

1. If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, or managing agent thereof;

2. If against any county, incorporated town, school district, or other public corporation in this state, to the clerk of such county, incorporated town, school district, or other public corporation;

3. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed;

4. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian and to the defendant personally.

5. In all other cases to the defendant personally, or if he be not found, to some white person of the family, above the age of fourteen years, at the dwelling house or usual place of abode of the defendant.

SEC. 55. When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, and it in like manner appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a summons in either of the following cases:

1. When the defendant is a foreign corporation, and has property within the State, or the cause of action arose therein;

2. When the defendant being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or shall keep himself concealed therein with the like intent;

3. When the defendant is not a resident of the state but has property therein, and the court has jurisdiction of the subject of the action.

Sec. 56 The order shall direct the publication to be made in a newspaper published in the county where the action is commenced, and if there be no newspaper published in the county, then in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the state, shall be equivalent to publication and deposit in the post office. In either case, the defendant shall appear and answer by the first day of the term following the expiration of the time prescribed in the order for publication, and if he does not, judgment may be taken against him for want thereof. In case of personal service out of the state, the summons shall specify the time prescribed in the order for publication.

Sec. 57. The defendant against whom publication is ordered, or his personal representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and, the defendant against whom publication is ordered, or his representatives may in like manner, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment, and within one year after the entry of such judgment on such terms as may be just, and if the defence be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be thereby affected.

SEC. 58. Whenever it shall appear by the return of the sheriff, his deputy, or the person appointed to serve a summons, that the defendant is not found, the plaintiff may deliver another summons to be served, and so on until service be had; or the plaintiff may proceed by publication as in this title provided, at his election.

SEC. 59. When the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendant served, and if they are subject to arrest against the persons of the defendants served; or

2. If the action be against the defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant, or defendants, if the action had been against them, or any of them alone.

SEC. 60. Proof of the service of the summons, or of the deposit thereof in the post-office, shall be as follows:

1. If the service, or deposit in the post office, be by the sheriff or his deputy, the certificate of such sheriff or deputy; or,

2. If by any other person, his affidavit thereof; or

3. In case of publication, the affidavit of the printer or his foreman or his principal clerk, showing the same; or,

4. The written admission of the defendant. In case of service, otherwise than by publication, the certificate, affidavit or admission must state the time and place of service; and in case of deposit in the post office, the time and place thereof.

SEC. 61. From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him.

TITLE VI.

Of the pleadings.

SEC. 62. Forms of pleadings heretofore existing abolished. | 63. Pleadings on the part of the Plaintiff and defendant.

SEC. 62. All the forms of pleading heretofore existing in actions at law, are abolished; and hereafter the forms of pleading in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, shall be those prescribed by this code.

SEC. 63. The only pleadings on the part of the plaintiff shall be:

1. The complaint:
2. The demurrer; or
3. The reply.

And on part of the defendant:

1. The demurrer; or
2. The answer.

TITLE VII.

Of the complaint.

SEC. 64. First pleading, to be complaint. | 65. What complaint to contain.

SEC. 64. The first pleading on the part of the plaintiff, shall be the complaint.

SEC. 65. The complaint shall contain:

1. The title of the cause, specifying the name of the court, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting the cause of action, without unnecessary repetition.

3. A demand of the relief which the plaintiff claims. If the recovery of money, or damages be demanded, the amount thereof shall be stated.

TITLE VIII.

Of the demurrer.

SEC. 66. When the defendant may demur, and for what.
67. Demurrer must specify ground of objection to complaint.
68. How to proceed if complaint be amended.
69. Objection when taken by answer.
70. Objection when deemed waived.

SEC. 66. The defendant may demur to the complaint within the time required by law to appear and answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or
2. That the plaintiff has not legal capacity to sue; or
3. That there is another action pending between the same parties for the same cause; or
4. That there is a defect of parties, plaintiff or defendant; or
5. That several causes of action have been improperly united; or
6. That the complaint does not state facts sufficient to constitute a cause of action.
7. That the action has not been commenced within the time limited by this code.

SEC. 67. The demurrer shall distinctly specify the grounds of objection to the complaint, unless it does so it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

SEC. 68. If the complaint be amended, a copy thereof shall be served on the defendant or his attorney, and the defendant shall answer the same within such time as may be prescribed by the court, and if he omit to do so, the plaintiff may proceed to obtain judgment as in other cases of failure to answer.

SEC. 69. When any of the matters enumerated in section 66 do not appear upon the face of the complaint, the objection may be taken by answer.

SEC. 70. If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

TITLE IX.

Of the answer.

SEC. 71. What the answer shall contain.
72. Nature of counter claim, and how stated.
73. Defendant may demur to one or more of several causes of action, and answer the rest.
74. Sham and irrelevant answer stricken out on motion.

SEC. 71. The answer of the defendant shall contain:

1. A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defence or counter claim, in ordinary and concise language without repetition.

SEC. 72. The counter claim mentioned in section 71, must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim;

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action;

The defendant may set forth by answer, as many defences and counter claims as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

SEC. 73. The defendant may demur to one or more of several causes of actions stated in the complaint, and answer the residue.

SEC. 74. Sham, frivolous and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in its discretion impose.

TITLE X.

Of the reply.

SEC. 75. Reply, when made, and what to contain.
76. When plaintiff may demur to new matter in answer.
77. When defendant may move for judgment on answer.
78. When defendant may demur to reply.

SEC. 75. When the answer contains new matter, constituting a defence or counter claim, the plaintiff may reply to such new matter, denying specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer.

SEC. 76. The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof, that such new matter does not constitute a defence or counter claim, or he may for like cause demur to one or more of such defences or counter claims, and reply to the residue.

SEC. 77. If the answer contain a statement of new matter constituting a defence or counter claim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages.

SEC. 78. The defendant may demur to any new matter contained in the reply, when it appears upon the face thereof, that such new matter is not a sufficient reply to the facts stated in the answer. Sham, frivolous and irrelevant replys, may be stricken out, in like manner, and on the same terms, as like answers and defences.

TITLE XI.

General rules of pleading.

SEC. 79. Verification of pleadings.
80. When verification may be omitted.
81. When pleadings filed, or motion to strike out.
82. Manner of pleading an account.
83. How pleadings construed.
84. Irrelevant and redundant matter may be stricken out.
85. Judgments how pleaded.
86. Conditions precedent, how pleaded.
87. Private statute, how pleaded.
88. Libel or slander, how pleaded.
89. What may be pleaded in answer in such cases.
90. Answer in action to recover the possession of property destrained.
91. What causes of action may be united in same complaint.
92. Material allegation not denied, when deemed true.
93. What is a material allegation.

SEC. 79. Every pleading shall be subscribed by the party or his attorney, and, except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true. The verification must be made by the affidavit of the party, or, if there be several parties united in interest and pleading together, by one at least of such parties, if such party be within the county and capable of making the affidavit; otherwise the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney, if the action or defence be founded on a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the affidavit is made by the agent or attorney, it must set forth the reason of his making it. When a corporation is a party, the verification may be made by any officer thereof, upon whom service of a summons might be made, and when the state or any officer thereof in its behalf is a party, the verification may be made by any person to whom all the material allegations of the pleading are known.

Sec. 80. When in the judgment of the court, an answer to an allegation in any pleading, might subject the party answering to a prosecution for felony, the verification of the answer to such allegation may be omitted.

Sec. 81. The answer or demurrer to the complaint, shall be filed with the clerk by the time required to answer, and thereafter each pleading shall be filed in like manner, within one day from the filing of the pleading to which it is a reply or demurrer. A motion to strike out a pleading for want of verification or subscription, or because several causes of action, or defence therein are not pleaded separately, or for other cause, or a sham, frivolous or irrelevant pleading, or irrelevant or redundant matter therein, shall be made within the time prescribed for answering such pleading.

Sec. 82. A party may set forth in a pleading the items of an account therein alleged, or file a copy thereof with the pleading, verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true. If he do neither, he shall deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, verified as in this section provided, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one filed or delivered is defective.

Sec. 83. In the construction of a pleading for the purpose, of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

Sec. 84. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of the adverse party; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

Sec. 85. In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

Sec. 86. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance.

Sec. 87. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Sec. 88. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish on trial that it was so published or spoken.

Sec. 89. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Sec. 90. In an action to recover the possession of property, distrained doing damage, an answer that the defendant or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

Sec. 91. The plaintiff may unite several causes of action in the same complaint when they all arise out of

1. Contract, express or implied; or,
2. Injuries, with or without force, to the person; or,
3. Injuries, with or without force, to property; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages for the withholding thereof; or,
6. Claims to recover personal property, with or without damage for the withholding thereof; or,
7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the cause of action so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

Sec. 92. Every material allegation of the complaint, not specifically controverted by the answer, and every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purpose of the action, be taken as true; but the allegation of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

Sec. 93. A material allegation in a pleading is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient.

TITLE XII.

Of mistakes in pleadings, and amendments.

Sec. 94. When variance deemed material.
95 When variance not material.
96. What deemed a failure of proof.
97. What pleading may be amended of course.
98. Amendments and pleading over after demurrer.
99. Amendments allowed by court before trial or submission.
100. Court may enlarge time to plead, or relieve party from judgment.
101. When defendant may be sued by fictitious name.
102. Amended pleadings before trial, to be new pleadings.
103. Pleading not verified, or containing several causes of action or defence, not separately stated, may be stricken out.
104. No error to be regarded, unless it affect substantial rights
105. Supplemental pleadings.

Sec. 94 No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defence upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled: and thereupon the court may order the pleading to be amended upon such terms as shall be just.

SEC. 95. When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

SEC. 96. When, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the two last sections, but a failure of proof.

SEC. 97. Any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering it shall expire; in such case, a copy of the amended pleading shall be served on the adverse party before the expiration of said period.

SEC. 98. After the decision upon a demurrer, if it be overruled, and it appears that such demurrer was interposed in good faith, the court may in its discretion allow the party to plead over upon such terms as may be proper. If the demurrer be sustained, the court may in its discretion, allow the party to amend the pleading demurred to, upon such terms as may be proper.

SEC. 99. The court may at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended, by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons, it may at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defence, by conforming the pleading or proceeding to the facts proved.

SEC. 100. The court may likewise in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this code, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.

Sec. 101. When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Sec. 102. When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint or otherwise, as the case may be. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

Sec. 103. Any pleading not duly verified and subscribed may, on motion of the adverse party, be stricken out of the case. When any pleading contains more than one cause of action or defence, if the same be not pleaded separately, such pleading may, on motion of the adverse party be stricken out of the case. When a motion to strike out is allowed, the court may upon such terms as may be proper, allow the party to file an amended pleading, or, if the motion be disallowed, and it appear to have been made in good faith, the court may upon like terms allow the party to plead over.

Sec. 104. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.

Sec. 105. The plaintiff and defendant respectively, may be allowed on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply.

TITLE XIII.

Of arrest and bail.

Sec. 106. When defendant may be arrested.
107. Proceeding to obtain arrest.
108. Defendant may be discharged on bail or deposite.
109. Bail, how given.
110. Surrender of defendant.
111 Same subject.
112 Bail, how proceeded against.

SEC. 113. Bail, how exonerated.
114. How and when, sheriff to deliver to plaintiff copy of undertaking of the bail. When plaintiff must except.
115. Notice of justification of bail.
116. Qualifications of bail.
117. Justification of bail.
118. Allowance of bail.
119. Deposite of money in lieu of bail.
120. Payment by sheriff of deposite to clerk.
121. Bail may be given, and deposite refunded.
122. Deposite, how applied, or disposed of.
123. When sheriff liable as bail, and how discharged from such liability.
124. Judgment against sheriff as bail.
125. When bail liable to sheriff.
126. Plaintiff liable in the first instance for the maintenance of defendant in arrest.
127. When sheriff may discharge defendant, for non payment of maintenance.
128. Motion to vacate order allowing writ of arrest.
129. Prosecuting thereon.

SEC. 106. No person shall be arrested in an action at law, except as provided in this section. The defendant may be arrested in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising out of contract, when the defendant is not a resident of the state, or is about to remove therefrom, or when the action is for an injury to person or character, or for injuring or wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested in any action, except for an injury to person, character or property.

SEC. 107. The mode of proceeding to obtain the arrest of the defendant for any of the causes specified in section 106, shall be as provided in this section.

1. At any time after the commencement of an action at law, and before judgment, an order, allowing a writ of arrest to issue therein, may be made by any circuit court, county court, or judge thereof of the state, when it shall appear to such court or judge, by the affidavit of the plaintiff or other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 106.

2. The affidavit may be either positive, or upon information and belief, but if the latter, it shall state the nature and sources of the information upon which the belief is founded. The order shall prescribe the amount of the bail, the amount of the undertaking of the plaintiff, and whether the latter shall be given with or without sureties. The amount of the undertaking shall not be less than one hundred dollars, and shall be equal to the amount for which the plaintiff demands judgment.

3. Upon filing the order and affidavit with the clerk of the court where the action is pending, the plaintiff shall be entitled to have the writ issue, as soon thereafter as he shall file with the clerk his undertaking in conformity with the provisions of the order, and to the effect, that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking.

4. If the undestaking be executed without sureties, the plaintiff shall file therewith, his affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking, over all his debts and liabilities. If it be executed with sureties, the plaintiff shall file therewith, the affidavits of such sureties that they are residents within the state; from which affidavits it must appear that such sureties taken together, are worth double the amount of the sum specified in the undertaking, over all debts and liabilities, and property exempt from execution. No person not qualified to become bail upon an arrest, is qualified to become surety in an undertaking for an arrest.

5. The writ of arrest shall be issued by the clerk, and shall require the sheriff of any county where the defendant may be found, forthwith to arrest him and hold him to bail in the amount specified in the order, and that in default thereof, he keep him in custody until dis-

charged by law, and to return the writ to the clerk from whom it issued, with his doings endorsed thereon, when required by the plaintiff at any time before the defendant may be arrested, or afterwards, whenever the defendant shall have been discharged from the arrest on bail or otherwise.

6. The plaintiff shall deliver or cause to be delivered to the sheriff with the writ, a copy of the affidavit upon which the order was made, subscribed by himself or attorney. The sheriff upon the delivery of the writ shall endorse thereon the date of the receipt, and upon the arrest of the defendant, shall deliver to him a copy of the writ, and such copy of the affidavit. The sheriff shall execute the writ, by arresting the defendant and keeping him in custody, until discharged by law.

Sec. 108. The defendant at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the writ of arrest as provided in this title.

Sec. 109. The defendant may give bail, by causing a written undertaking to be executed in favor of the plaintiff by two or more sufficient sureties, stating their places of residence, to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section 106, an undertaking to the same effect as that provided by section 135.

Sec. 110. At any time before a failure to comply with the undertaking the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon as upon a writ of arrest, and shall by a certificate in writing acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the judge of the court may upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and the papers used on said application, with the clerk of the court where the action is pending, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in the third subdivision of section 106, so as to dis-

charge the bail from an undertaking given to the effect provided by section 135.

SEC. 111. For the purpose of surrendering the defendant, the bail at any time and place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower the sheriff or any other person of suitable age and discretion to do so.

SEC. 112. In case of the failure to comply with the undertaking, the bail may be proceeded against by action only.

SEC. 113. The bail may be exonerated either by the death of the defendant, or his imprisonment in the penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

SEC. 114. Within five days from the execution of the undertaking of the bail, the sheriff shall deliver to the plaintiff or his attorney, if either of them reside within the county where the arrest was made, or otherwise to such person within said county as the plaintiff may direct, a certified copy of the undertaking, with the date of the arrest endorsed thereon. In any other case the sheriff may mail such copy, within the same time to the plaintiff or his attorney, within the State, or to either of them as the plaintiff may direct. The plaintiff within ten days from the delivery of such copy, or fifteen days from the mailing of the same, if sent by mail, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the clerk of the court where the action is pending.

SEC. 115. On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bail, specifying the places of residence and occupation of the latter, before a judge of the circuit court, or county court, or clerk of the court where the action is pending, at a specified time and place; the time to be not less than five, nor more than ten days thereafter. In case neither the plaintiff or his attorney reside within the county where the arrest is made, the notice may be served upon the person and in the manner provided for serving the copy of the undertaking in section 114. In case other bail be given there shall be a new undertaking in the form and to the effect prescribed in section 109.

SEC. 116. The qualifications of bail shall be as follows:

1. Each of them shall be a resident and householder or freeholder within the state; but no counsellor or attorney at law, sheriff, clerk of any court, or other officer of any court, shall be permitted to become bail in any action.

2. Each of them shall be worth the amount specified in the writ of arrest, or the amount to which the same may be reduced as provided in this title over and above all debts and liabilities, and exclusive of property exempt from execution; but the judge or clerk on justification may allow more than two sureties to justify severally in amounts less than that expressed in the writ, if the whole justification be equivalent to that of two sufficient bail.

SEC. 117. For the purpose of justification, each of the bail shall attend before the judge or clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk in his discretion may think proper. The examination shall be reduced to writing and subscribed by the bail, if required by the plaintiff.

SEC. 118. If the judge or clerk find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk of the court in which the action is pending; and the sheriff shall thereupon be exonerated from liability.

SEC. 119. The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the writ. Thereupon the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged out of custody.

SEC. 120. The sheriff shall within four days after the deposit pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency.

SEC. 121. If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 109, at any time before judgment, and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

SEC. 122. When money shall have been so deposited, if it remain on deposite at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

SEC. 123. If, after being arrested the defendant escape, or be rescued, or bail be not given, or justified, or a deposite be not made instead thereof, the sheriff himself shall be liable as bail; but he may discharge himself from such liability, by the giving and justification of bail, as provided in sections, 115, 116, 117 and 118, at any time before process against the person of the defendant, to enforce an order or judgment in the action.

SEC. 124. If a judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency.

SEC. 125. The bail taken upon the arrest, shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for any damages which he may sustain by reason of such omission.

SEC. 126. The fees which shall be allowed to the sheriff for the food and maintenance of any defendant arrested under the provisions of this act, shall be as provided by law and the plaintiff shall be liable in the first instance for such fees, and if required by the sheriff, shall pay the same weekly in advance; and such fees so paid shall be added to the disbursements taxed or accruing in the case, and be collected as other disbursements.

SEC. 127. If the plaintiff shall neglect to pay such fees for three days after a demand of payment, the sheriff may discharge the defendant out of custody.

SEC. 128. A defendant arrested may at any time before judgment, apply on motion to the judge who made the order, or to the court or judge thereof, in which the action is pending, upon notice to the plaintiff to vacate the order allowing the writ of arrest, except where the cause of arrest and the causes of action are the same.

SEC. 129. If a motion be made upon affidavits or other proofs on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order was made. If upon the hearing of such motion, it shall satisfactorily appear that there was not sufficient cause to allow the writ, the order shall be vacated.

TITLE XIV.

Of the recovery of personal property.

SEC. 130. When delivery may be claimed, in an action for the possession of personal property.
131. Affidavit therefor, what it must show.
132. Indorsement thereon requiring sheriff to take property.
133. Undertaking to sheriff on the part of the plaintiff.
134. Exception to sureties by defendant, proceedings thereon.
135. How, and when defendant entitled to re-delivery.
136. Justification of sureties on defendant's undertaking.
137. Qualification and justification of sureties.
138. Power of sheriff when property concealed in building or enclosure.
139. Property how kept, and when delivered to plaintiff.
140. Proceedings, when claimed by third persons.
141. Return of affidavit by sheriff.

SEC. 130. In an action to recover the possession of personal property, the plaintiff, at any time after the action is commenced and before judgment, may claim the immediate delivery of such property, as provided in this title.

SEC. 131. When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which, shall be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That the same has not been taken for a tax, assessment or

fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute, exempt from such seizure; and,

5. The actual value of the property.

SEC. 132. The plaintiff may thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county, where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

SEC. 133. Upon the receipt of the affidavit and indorsement thereon, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, indorsement thereon and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken: or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or, if neither have any known place of abode, by putting them in the post office, directed to the defendant at the post office nearest to him.

SEC. 134. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

SEC. 135. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to be approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of a copy of the affidavit and undertaking on the defendant, it shall be delivered to the plaintiff, except as provided in section 139.

SEC. 136. The defendant's sureties, upon a notice to the plaintiff or his attorney of not less than two, nor more than six days, shall justify before a judge of the circuit or county court, or the clerk of the court in which the action is pending, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they or others in their place fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

SEC. 137. The qualification of sureties and their justification shall be as prescribed by sections 116 and 117 in respect to bail upon an order of arrest.

SEC. 138. If the property or any part thereof be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

SEC. 139. When the sheriff shall have taken property, as in this title provided, he shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

SEC. 140. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and freeholders or householders of the county. And no claim to such property by any other person than the defendant or his agent, shall be valid against the sheriff unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

SEC. 141. The sheriff shall file the affidavit, with his proceedings thereon, including an inventory of the property taken, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein; or, if the clerk reside in another county, shall mail or forward the same within that time.

TITLE XV.

Of attachment.

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167. Judgment against the garnishee, upon answer or trial.
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SEC. 142. In an action for the recovery of money or damages, the plaintiff at any time after the commencement of the action, and before judgment, may have the property of the defendant attached in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as he may recover.

SEC. 143. A writ of attachment shall be issued by the clerk of the court in which the action is pending, whenever the plaintiff or any one on his behalf shall make and file an affidavit, that a cause of action exists against the defendant, and the grounds thereof, and that the defendant is either:

1. A foreign corporation; or,
2. That he is not a resident of this state, or has departed therefrom with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or,
3. That he has removed, or is about to remove any of his property from this state with intent to delay or defraud his creditors; or,
4. That he has assigned, secreted, or disposed of any of his property, or is about to assign, secrete or dispose of it, with intent to delay or defraud his creditors; or,
5. That the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought.

The affidavit may be either positive, or upon information and belief, but if the latter, it shall state the nature and sources of the information upon which the belief is founded.

SEC. 144. Upon filing the affidavit with the clerk, the plaintiff shall be entitled to have the writ issue, as soon thereafter as he shall file with the clerk his undertaking, with one or more sureties, in a sum not less than one hundred dollars, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking. With the undertaking the plaintiff shall also file the affidavits of the sureties, from which affidavits it must appear that such sureties are qualified, and that taken together they are worth double the amount of the sum specified in the undertaking, over all debts and liabilities, and property exempt from execution. No person not qualified to become bail upon an arrest, is qualified to become surety in an undertaking for an attachment.

SEC. 145. The writ shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

SEC. 146. The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest, and profits thereon, and all other property in this state of such defendant, not exempt from execution, shall be liable to be attached. The sheriff shall note upon the writ the date of its delivery to him, and shall make a full inventory of the property attached, and return the same with the writ.

SEC. 147. The sheriff to whom the writ is directed and delivered shall execute the same without delay, as follows:

1. Real property shall be attached, by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff;

2. Personal property capable of manual delivery to the sheriff, and not in the possession of a third person shall be attached by taking it into his custody.

3. Other personal property shall be attached, by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same, or if it be a debt, then with the debtor, or if it be rights or shares in the stock of an association or corporation or interest, or profits thereon, then with such person or officer of such association or corporation as this code authorizes a summons to be served upon.

SEC. 148. From the date of the attachment, until it be discharged or the writ executed, the plaintiff as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration, of the property real or personal attached, subject to the conditions prescribed in the next section as to real property. Any person, association or corporation mentioned in subdivision 3 of section 147, from the service of a copy of the writ and notice as therein provided, shall, unless such property, stock, or debts, be delivered, transferred, or paid to the sheriff, be liable to the plaintiff for the amount thereof, until the attachment be discharged or any judgment recovered by him be satisfied.

SEC. 149. If real property be attached, the sheriff shall make a certificate, containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached, at the suit of the plaintiff, and the date thereof. Within ten days from the date of the attachment, the sheriff shall deliver such certificate to the county clerk of the county in which such real property is situated, who shall file the same in his office, and record it in a book to be kept for that purpose. When such certificate is so filed for record, the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment; but if filed afterwards, it shall only attach, as against third persons, from the date of such subsequent filing. Whenever such lien shall be discharged, it shall be the duty of the county clerk, when requested, to record the transcript of any order, entry of satisfaction of judgment, or other proceeding of record, whereby it appears that such lien has been discharged, in the book mentioned in this section. The clerk shall also enter on the margin of the page, on which the certificate is recorded, a minute of the discharge, and the page and book where recorded.

SEC. 150. Whenever the sheriff with a writ of attachment against the defendant, shall apply to any person or officer mentioned in subdivision 3 of section 147, for the purpose of attaching any property mentioned therein, such person or officer shall furnish him with a certificate, designating the amount and description of any property in his possession belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest, or profits, or incumbrance thereon. If such person or officer refuse to do so, or if the certificate when given be unsatisfactory to the plaintiff, he may be required by the court or judge thereof where the action is pending to appear before him, and be examined on oath concerning the same, and disobedience to such order may be punished as contempt.

SEC. 151. If any of the property attached be perishable, the sheriff shall sell the same in the manner, in which property is sold on execution. The proceeds thereof and other property attached, shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Personal property mentioned in subdivision 3 of section 147, may be delivered, transferred, or paid to the sheriff, without suit, and his receipt therefor shall be a sufficient discharge accordingly.

Sec. 152. The sheriff may deliver any of the property attached to the defendant, or to any other person claiming it, upon his giving a written undertaken therefor, executed by two or more sufficient sureties, engaging to re-deliver it, or pay the value thereof to the sheriff, to whom execution upon a judgment obtained by the plaintiff in that action may be issued.

Sec. 153. If an action be brought upon such undertaking against the principal or his sureties, it shall be a defence that the property for which the undertaking was given, did not at the excution of the writ of attachment, belong to the defendant against whom it was issued.

Sec. 154. If any personal property attached, be claimed by a third person as his property, the sheriff may summon a jury to try the validity of such claim, and the same proceedings shall be had thereon with the like effect, as in case of seizure upon execution.

Sec. 155. If judgment be recovered by the plaintiff, and execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof upon the execution, and if there be any of such property or proceeds remaining after satisfying such execution, he shall upon demand deliver the same to the defendant.

Sec. 156. If judgment be not recovered by the plaintiff, all the property attached, or the proceeds thereof, or the undertaking therefor, shall be returned to the defendant, upon his serving upon the sheriff, a certified copy of the order discharging the attachment.

Sec. 157. Whenever the defendant shall have appeared in the action he may apply upon notice to the plaintiff to the court or judge where the action is pending, or to the clerk of such court, for an order to discharge the attachment upon the execution of the undertaking mentioned in the next section; and if the application be allowed, all the procceeds of sales, and property remaining in his hands, shall be released from the attachment and delivered to the defendant, upon his serving a certified copy of the order on the sheriff.

Sec. 158. Upon such application, the defendant shall deliver to the court or judge to whom the application is made, an undertaking executed by one or more sureties, resident householders or freeholders of this state, to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. If the plaintiff demand it, the sureties shall be required to justify in the same manner as bail upon an arrest.

Sec. 159. The defendant may at any time before judgment, except where the cause of attachment and the cause of action are the same, apply to the court or judge thereof, where the action is pending, to discharge the attachment, in the manner and with the effect, as provided in sections 128, 129, for the discharge of a defendant from arrest.

Sec. 160. When the writ of attachment shall be fully executed or discharged, the sheriff shall return the same, with his proceedings endorsed thereon, to the clerk of the court where the action was commenced.

Sec. 161. The order provided for in section 150, shall require such person or officer, to appear before such court or judge at a time and place therein stated. In the proceedings thereafter upon such order, such person or association or corporation, shall be known as the garnishee.

Sec. 162. After the allowance of the order, and before such garnishee or officer thereof shall be thereby required to appear, or within a time to be specified in the order, the plaintiff may serve upon such garnishee or officer thereof, written allegations and interrogatories touching any of the property liable to attachment as the property of the defendant as provided in subdivision 3, of section 147, and as to which such garnishee or officer thereof is required to give a certificate as provided in section 150.

Sec. 163. On the day when the garnishee or officer thereof, shall be required to appear before the court or judge thereof, he shall return the allegations and interrogatories of the plaintiff, to the court or judge, with his written answer thereto, unless for good cause shown a further time be allowed. Such answer shall be on oath, and shall contain a full and direct response to all the allegations and interrogatories.

Sec. 164. If the garnishee or officer thereof fail to answer, the court or judge thereof on motion of the plaintiff, may compel him to do so, or the plaintiff may, at any time after the entry of judgment against the defendant in the action, have judgment against the garnishee for want of such answer. In no case shall judgment be given against the garnishee for a greater amount, than the judgment against the defendant in the action.

Sec. 165. The plaintiff may except to the answer of the garnishee or officer thereof for insufficiency, within such time as may be prescribed or allowed, and if the same be adjudged insufficient, such garnishee or officer may be allowed to amend his answer, on such terms as may be proper, or judgment may be given for the plaintiff as for want of answer, or such garnishee or officer may be compelled to make a sufficient answer.

SEC. 166. The plaintiff may reply to the whole or a part of the answer within such time as may be prescribed or allowed, and the issues arising thereon shall be tried as ordinary of issues of fact between plaintiff and defendant. If the answer be not excepted, or replied to within the time prescribed or allowed, it shall be taken to be true and sufficient.

SEC. 167. If by the answer it shall appear, or if upon trial it shall be found, that the garnishee, at the time of the service upon him or the officer thereof, of the copy of the writ of attachment and notice, had any property of the defendant's liable to attachment as provided in subdivision 3 of section 147, and as to which such garnishee or officer thereof is required to give a certificate as provided in section 150, beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against such garnishee for the value thereof in money. The garnishee may at any time before judgment discharge himself by delivering, paying or transferring the property to the sheriff.

SEC. 168. Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner. Witnesses, including the defendant and garnishee or officer thereof, may be required to appear and testify upon such proceeding against a garnishee, as upon the trial of an issue of fact.

SEC. 169. The court or judge thereof in its discretion may, at the time of the application of the plaintiff for the order provided for in section 150, and at any time thereafter before judgment against the garnishee, by order restrain the garnishee from paying, transferring, or in any manner disposing of, or injuring, any of the property of the defendant, alleged by the plaintiff to be in the garnishee's possession, control, or owing by him to the defendant, and disobedience to such order may be punished as a contempt.

SEC. 170. The proceedings provided for in titles XIII., XIV. and XV. shall be known as provisional remedies.

CHAPTER II.

TITLE I.—*Of issues and the mode of trial.*
TITLE II.—*Of the formation of the jury.*
TITLE III.—*Conduct of the trial by jury.*
TITLE IV.—*Of the verdict.*
TITLE V.—*Trial by the court.*
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TITLE I.

Of issues and the mode of trial.

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SEC. 171. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and controverted by the other. They are of two kinds:

1. Of law; and
2. Of fact.

SEC. 172. An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof.

SEC. 173. An issue of fact arises:

1. Upon a material allegation in the complaint, controverted by the answer; or

2. Upon new matter in the answer controverted by the reply; or

3. Upon new matter in the reply, except an issue of law is joined thereon.

Sec. 174. Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law shall be first tried, unless the court otherwise direct.

Sec. 175. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Sec. 176. An issue of law shall be tried by the court, unless referred as provided in title VI. of chapter II. An issue of fact shall be tried by a jury, unless tried by the court or referred as provided in titles V. and VI. of chapter II.

Sec. 177. A motion to postpone a trial on the ground of the absence of evidence, shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and what diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed. The court when it allows the motion, may impose such conditions or terms upon the moving party as may be just.

TITLE II.

Of the formation of the jury.

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Sec. 178. Trial juries shall be formed as follows:

When the action is called for trial the clerk shall draw from the trial jury box of the court, one by one, the ballots containing the names of the jurors until the jury is completed, or the ballots are exhausted. If the ballots become exhausted before the jury is complete, the sheriff under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever as in this section provided, the sheriff shall summon more than one person at a time from the bystanders or the body of the county, he shall return a list of the persons so summoned to the clerk. The clerk shall write the names of such persons upon separate ballots, and deposite the same in the trial jury box, and then draw such ballots therefrom, as in the case of the panel of trial jurors for the term. The jury shall consist of twelve persons unless, the parties consent to a less number. Such consent shall be entered in the journal.

SEC. 179. No challenge shall be made or allowed to the panel. A challenge is an objection to a particular juror and may be either:

1. Peremptory; or
2. For cause.

SEC. 180. A peremptory challenge, is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

SEC. 181. A challenge for cause is an objection to a juror, and may be either:

1. General; that the juror is disqualified from serving in any action; or
2. Particular; that he is disqualified from serving in the action on trial.

SEC. 182. General causes of challenge are:

1. A conviction for a felony.
2. A want of any of the qualifications prescribed by law for a juror.
3. Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of performing the duties of a juror.

SEC. 183. Particular causes of challenge are of two kinds:

1. For such a bias as, when the existence of the facts is as ascer-

tained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

2. For the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially, and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

Sec. 184. A challenge for implied bias may be taken for any or all of the following causes, and not otherwise.

1. Consanguinity or affinity within the fourth degree to either party.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of the adverse party, or being surety or bail in the action called for trial, or otherwise, for the adverse party.

3. Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same fact or transaction.

4. Interest on the part of the juror in the event of the action, or the principal question involved therein.

Sec. 185. A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section 183. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances, that the juror cannot disregard such opinion, and try the issue impartially.

Sec. 186. An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted.

Sec. 187. A peremptory challenge, or a challenge for cause may be taken by either party. When there are two or more parties plaintiffs or defendants, they must join in the challenge, or it cannot be taken. Either party shall be entitled to three peremptory challenges and no more.

Sec. 188. All challenges shall be taken first by the defendant and then by the plaintff, and the defendant shall exhaust his challenges to a particular juror before the plaintiff begins. All challenges shall be taken to each juror as he is drawn and appears, and before another juror is drawn, unless the court for good cause shown shall permit a challenge to be taken afterwards and before the number of the jury is completed.

Sec. 189. The challenges of either party shall be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. For general disqualification.
2. For implied bias.
3. For actual bias.
4. Peremptory; but either party may take peremptory challenge at any time before his right of challenge ceases.

Sec. 190. The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue, and determine the law and the fact.

Sec. 191. Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact, shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded. But if determined or found otherwise, it shall be disallowed.

Sec. 192. The challenge, the exception and the denial, may be made orally. The judge of the court shall note the same upon his minutes, and the substance of the testimony on either side.

Sec. 193. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors in substance, that they and each of them, will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

TITLE III.

Conduct of the trial by jury.

SEC. 194. Order of proceedings on the trial.
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209. Jury may be polled, or insufficient verdict corrected.
210. When verdict complete, and jury discharged, verdict to be in writing and entered on the journal.

SEC. 194. When the jury has been completed and sworn the trial shall proceed in the order prescribed in this section, unless the court for special reasons otherwise direct:

1. The plaintiff shall state briefly his cause of action, and the issue to be tried; the defendant shall then in like manner state his defence, or counter claim.

2. The plaintiff shall then offer the evidence on his part, and when he has concluded, the defendant shall do the same.

3. The parties may then respectively offer rebutting evidence only, unless the court for good reason, and in furtherance of justice, permit them to offer evidence upon the original cause of action or defence.

4. Not more than two counsel shall be allowed to address the jury on behalf of the plaintiff or defendant. The whole time occupied on behalf of either shall not exceed one hour.

5. When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argue the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, and not otherwise.

6. The court may then charge the jury.

SEC. 195. Whenever in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose. While the jury are thus absent, no person, other than the judge or the person so appointed, shall speak to them on any subject connected with the trial.

SEC. 196. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

SEC. 197. If, after the formation of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case unless the parties agree to proceed with the other jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

SEC. 198. In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it presents the facts of the case, it shall also inform them that they are the exclusive judges of all questions of fact.

SEC. 199. A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy, to his fellow jurors, nor be governed by the same in giving his verdict.

SEC. 200. After hearing the charge, the jury may either decide in the jury box, or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury thus together separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to him, and he shall be then sworn, to conduct himself according to its provisions, to the utmost of his ability.

SEC. 201. If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.

SEC. 202. Upon returning for deliberation, the jury may take with them the pleadings, in the cause, and all papers which have been received as evidence on the trial, (except depositions;) or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court to be taken from the person having them in possession. They may also take with them notes of the testimony or other proceedings on the trial taken by themselves, or any of them, but none taken by any other person.

SEC. 203. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to the parties or their attornies.

SEC. 204. Except as provided in sections 197 and 207, or in case of some accident or calamity requiring their discharge, the jury shall not be discharged after the cause is submitted to them, until they have agreed upon a verdict, and given it in open court, unless by the consent of both parties entered in the journal, or unless at the expiration of such period as the court deem proper, it satisfactorily appears, that there is no probability of an agreement.

SEC. 205. In all cases where a jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court directs.

SEC. 206. While the jury are absent, the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open, for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. A final adjournment of the court discharges the jury.

SEC. 207. When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. Their names shall then be called, and if all do not appear, the rest shall be discharged without giving a verdict.

SEC. 208. If the jury appear, they shall be asked by the court or the clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, he shall, on being required, declare the same.

SEC. 209. When a verdict is given, and before it is filed, the jury may be polled on the request of either party; for which purpose each shall be asked whether it be his verdict; if any juror answer in the negative, the jury shall be sent out for further deliberation. If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

SEC. 210. When the verdict is given, and is such as the court may receive, and if no juror disagree, or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given.

TITLE IV.

Of the verdict.

SEC. 210.* Definition of verdict, general or special.
211. In actions for the recovery of specific personal property.
212. When jury may give general or special verdict.
213. Special verdict to control general.
214. When counter claim pleaded in the answer.

SEC. 210.* The verdict of a jury is either general or special. A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

SEC. 211. In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding such property.

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*NOTE.—There are two sections 210 in the original act, and the sections following are numbered in regular succession. We do not change one, for fear it may put out of place references to subsequent sections.—PRINTER.

SEC. 212. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing. The special verdict or finding shall be filed with the clerk and entered in the journal, as provided in title III, of this chapter.

SEC. 213. When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

SEC. 214. When a verdict is found for the plaintiff in an action for recovery of money, or for the defendant when a counter claim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of recovery; they may also, under the direction of the court, assess the amount of the recovery when the court give judgment for the plaintiff on the answer.

TITLE V.

Trial by the court.

SEC. 215. Trial by jury how waived.
216. Decision of the court how made, and when filed.
217. Order of proceedings, and effect of finding.

SEC. 215. Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

1. By failing to appear at the trial;

2. By written consent, in person, or by attorney, filed with the clerk;

3. By oral consent in open court, entered in the minutes.

Sec. 216. Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk during the term, or within twenty days thereafter. The decision shall state the facts found, and the conclusion of law separately, without argument or reason therefor. Such decision shall be entered in the journal and judgment entered thereon accordingly. The court may deliver any argument or reason in support of such decision, either orally, or in writing separate from the decision and file the same with the clerk.

Sec. 217. The order of proceedings on a trial by the court, shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons as far as applicable, and a new trial granted.

TITLE VI.

Trial by referees.

Sec. 218. The trial of any issue may [be] referred by consent.
219. When reference may be ordered by the court.
220. Number of referees and how chosen.
221. When chosen by the court, qualifications of.
222. Right and mode of challenge to referees, when chosen by the court.
223. Proceedings, same as in trial by court.
224. What report to contain. Evidence to accompany it.
225. Motion to set aside report, or for judgment thereon.
226. Proceedings thereon.

Sec. 218. All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties.

Sec. 219. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or

2. When the taking of an account shall be necessary for the

information of the court, before judgment upon an issue of law, or for carrying a judgment or order into effect; or

3. When a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action; or

4. When it is necessary for the information of the court in a special proceeding.

SEC. 22. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge may appoint one or more, not exceeding three.

SEC. 221. When the appointment of referees is made by the court or judge, each referee shall be:

1. Qualified as a juror as provided by statute;
2. Competent as a juror between the parties.

SEC. 222. When the referees are chosen by the court, each party shall have the same right of challenge, as to such referees, to be made and determined in the same manner and with like effect, as in the formation of juries, except that neither party shall be entitled to a peremptory challenge.

SEC. 223. Subject to the limitations and directions prescribed in the order of reference, the trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments, administer oaths, to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses, and to punish them for non-attendance, or refusal to be sworn or testify as is possessed by the court.

SEC. 224. The report of the referees shall state the facts found, and when the order of reference includes an issue of law, it shall state the conclusions of law separately from the facts. The referees shall file with their report the evidence received upon the trial. If evidence offered by either party shall not be admitted on the trial, and the party offering the same except to the decision rejecting such evidence at the time, the exception shall be noted by the referees, and they shall take and receive such testimony, and file it with the report. Whatever judgment the court may give upon the report, it shall, when it appears that such evidence was frivolous or inadmissible, require the party at whose instance it was taken and reported, to pay all costs and disbursements thereby incurred.

SEC. 225. The report shall be filed with the clerk. If it be filed in term time, either party may within such time as may be prescribed by the rules of the court, or by special order, move to set the same aside or for judgment thereon, or such order or proceeding as the nature of the case may require. If the report be filed in vacation the like proceedings may be had at the next term following.

SEC. 226. The court may affirm or set aside the report either in whole or in part. If it affirm the report, it shall give judgment accordingly. If the report be set aside either in whole or in part, the court may make another order of reference, as to all, or so much of he report as is set aside, to the original referees, or others, or it may find the facts and determine the law itself, and give judgment accordingly. Upon a motion to set aside a report the conclusions thereof shall be deemed and considered as the verdict of a jury.

TITLE VII.

Of exceptions.

SEC. 227. Definition of exception, must be material.
228. Exceptions how stated and settled.
229. No particular form required.
230. To be signed by the judge and filed. When exceptions need not be taken or allowed.

SEC. 227. An exception is an objection taken at the trial to a decision upon matter of law, whether such trial be by jury, or court, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties.

SEC. 228. The point of the exception shall be particularly stated, and may be delivered, in writing, to the judge, or entered in his minutes, and at the time or afterwards, be corrected until made conformable to the truth.

SEC. 229. No particular form of exception shall be required. The objection shall be stated, with so much of the evidence or other matter as is necessary to explain it, but no more.

SEC. 230. The statement of the exception when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause. No exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court.

TITLE VIII.

Of new trial.

SEC. 231. Definition of new trial.
232. New trial, for what causes granted.
233 Motion for, when filed, and determined.
234. Upon trial by the court, and decision in vacation.
235. Motion must state the grounds thereof, when supported by affidavits.
236. When counter affidavits allowed.

SEC. 231. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision or verdict by a court or jury.

SEC. 232. The former verdict or other decision may be set aside and a new trial granted on the motion of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which such party was prevented from having a fair trial;
2. Misconduct of the jury or prevailing party;
3. Accident or surprise which ordinary prudence could not have guarded against;
4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
5. Excessive damages, appearing to have been given under the influence of passion or prejudice;
6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;
7. Error in law occurring at the trial, and excepted to by the party making the application.

SEC. 233. A motion for a new trial, with the affidavits, if any, in support thereof, shall be filed within one day after giving the verdict or other decision sought to be set aside. When the adverse party is entitled to oppose the motion by counter affidavits, he shall file the same within one day after the filing of the motion. The motion shall be heard and determined during the term, unless the court continue the same for advisement, or want of time to hear it. When not so heard and determined, or continued, it shall be deemed withdrawn, and may be disregarded.

SEC. 234. Upon a trial by the court when the decision is given in vacation, a motion for a new trial shall be filed within twenty days from the time of filing such decision. If the next regular term of said court shall commence within less than twenty days from the time of filing such decision, then such motion shall be filed by the first day of said term. In either case the adverse party may within four days after the filing of the motion, file counter affidavits, where the same are allowed.

SEC. 235. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated, shall be considered or regarded by the court. When the motion is made for a cause mentioned in the first, second, third and fourth subdivisions of section 232, it shall be upon affidavit, setting forth the facts upon which such motion is based.

SEC. 236. If the motion be supported by affidavits, counter affidavits may be offered by the adverse party; and if the cause be newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their non-production; and in the consideration of any motion for a new trial, reference may be had to any procedings in the case, prior to the verdict, or other decision sought to be set aside.

TITLE IX.

General provisions.

SEC. 237. Questions of law and fact, how submitted, and when.
238. Questions of fact to be decided by the jury.
239. Questions of law, and what of fact to be decided by the court.

SEC. 237. Any party may, when the evidence is closed, submit in distinct and concise propositions, the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written and handed to the court, or at the option of the court, oral, and entered in the judge's minutes.

Sec. 238. All questions of fact other than those mentioned in section 239, shall be decided by the jury, and all evidence thereon addressed to them.

Sec. 239. All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. And whenever the knowledge of the court, is by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive.

TITLE X.

Of judgment in general.

Sec. 240. Definition of judgment.
241. Judgment may be given for or against any of the parties.
242. When judgment may be given against one or more defendants, and action remain pending as to others.

Sec. 240. A judgment is the final determination of the rights of the parties in the action.

Sec. 241. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

Sec. 242. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others.

TITLE XI.

Of judgment of non-suit.

Sec. 243. When judgment of non-suit may be given.
244. What is a cause not sufficient to be submitted to the jury.
245. Effect of judgment of non-suit.

Sec. 243. A judgment of non-suit may be given against the plaintiff as provided in this title.

1. On motion of the plaintiff, at any time before trial, unless a counter claim has been pleaded as a defence.

2. On motion of either party, upon the written consent of the other filed with the clerk.

3. On motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when after the trial has begun and before the final submission of the cause, the plaintiff abandons it, or when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury.

SEC. 244. A cause not sufficient to be submitted to the jury, is one, where it appears, that if the jury were to find a verdict for the plaintiff, upon any or all of the issues to be tried, the court ought if required, set it aside for want of evidence to support it.

SEC. 245. When a judgment of non-suit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause.

TITLE XII.

Of judgment on failure to answer.

SEC. 246. When judgment may be given for want of answer.

SEC. 246. When the time for answering the complaint has expired, and it appears that the defendant, or one or more of several defendants, in the cases mentioned in section 59, has been duly served with the summons, and has failed to answer the complaint, the plaintiff shall be entitled to have judgment against such defendant or defendants.

1. When it appears that the action is upon a contract, and for the recovery of money or damages only, the plaintiff, on motion, shall have judgment immediately for the amount stated in the summons.

2. In other actions, the plaintiff on motion, shall have judgment immediately for the amount stated in the summons or the relief demanded in the complaint, unless it be necessary to enable the court to give judgment, or carry the same into effect, to take proof of any matter or fact, in which case the court may order the entry of judgment to be delayed until such proof be taken. The court may hear the proof itself, or make an order of reference, or that a jury be called to enquire thereof.

3. When the defendant has answered and admits the plaintiff's claim, but sets up a counter claim amounting to less than the plaintiff's claim, the plaintiff, on motion, shall have judgment for the excess of his claim over such counter claim, as for want of answer thereto.

4. When in any action the service of the summons appears to have been made by publication, the court may in its discretion order the entry of judgment to be delayed, until the plaintiff file with the clerk an undertaking with one or more sureties, to be approved by the clerk, in an amount equal to the sum for which judgment may be given, upon the condition that the plaintiff will abide by and perform any order of the court requiring restitution to be made to the defendant or his representative, in case either of them shall afterwards be admitted to defend the action. The sureties in the undertaking shall have the qualifications of bail, and justify before the clerk as provided in section 116.

TITLE XIII.

Of judgment by confession.

SEC. 247. Judgment by confession, where action pending.
248. Who to make confession.
249. When judgment may be given against several defendants on the confession of one.
250. Confession to be in writing, how judgment given.
251. Judgment by confession without action.
252. How confession made in such cases.
253. Same subject. Execution when judgment for installments.

SEC. 247. On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action, before or after answer, for any amount or relief, not exceeding or different from that demanded in the complaint.

SEC. 248. When the action is against the state, a county or other public corporation therein, or a private corporation, or a minor, the confession shall be made by the person who at the time sustains the relation to such state, corporation, county or minor, as would authorize the service of a summons upon him, or in the case of a minor, if a guardian for the action has been appointed, then by such guardian. In all other cases the confession shall be made by the defendant in person.

SEC. 249. When the action is upon a contract and against one or more defendants jointly liable, judgment may be given on the confession of one or more defendants against all the defendants thus jointly liable, whether such defendants have been served with the summons or not, to be enforced only against their joint property, and against the joint and separate property of the defendant making the confession.

SEC. 250. The confession and assent thereto, shall be in writing and subscribed by the parties or their attornies making the same, and acknowledged by each before some officer authorized to take acknowledgments of deeds; but such acknowledgement is not required, when the parties or their attornies, shall appear in court when the judgment is given, or before the clerk in vacation by whom the judgment is entered. In all cases the confession and assent thereto, and the acknowledgement if any, shall be filed with the clerk.

SEC. 251. On the confession of any person capable by this code of being made a party defendant to an action at law, judgment may be given against such person, without action, in term time or vacation in favor of any one; either, for money due or to become due, or to secure any person against contingent liability, on behalf of the defendant in such judgment, or both, if it be in favor of the same person.

SEC. 252. The confession shall be made, assented to, and acknowledged, and judgment given in the same manner, as a confession in an action pending; besides which, the confession shall be verified by the oath of the party making it, and shall authorize a judgment to be given for a particular sum. If it be for money due, or to become due, it shall state plainly and concisely the facts out of which such indebtedness arose and shall shew that the sum confessed therefor is justly due or to become due.

SEC. 253. If it be for the purpose of securing the plaintiff in the judgment against a contingent liability, it shall state plainly and concisely the facts constituting such liability, and shall shew that the sum confessed therefor, does not exceed the same. When judgment is given so as to be payable in installments, executions may issue to enforce the payment of such installments as they become due.1

TITLE XIV.

Of submitting controversy without action.

SEC. 254. Controversy, may be submitted without action.
255. Statement of the case, and verification thereof.
256. Statement to be filed with the clerk. Jurisdiction of court.

SEC. 254. Parties to a question in controversy, which might be the subject of an action at law in a court of record, with such parties plaintiffs or defendants; may submit the same to the determination of such court without action, as in this title provided.

SEC. 255. The parties as plaintiff and defendant, shall state in writing, a case containing the facts upon which the controversy depends, and subscribe the same in person or by their attornies. Such statement shall be verified by the oaths of the parties, or where there is more than one plaintiff or defendant, by at least one of each, to the effect that the controversy is real, and the proceeding is taken in good faith to determine the rights of the parties. Where either party to the controversy is the state, a county or other public corporation therein, or a private corporation or minor, the statement of the case may be subscribed and verified by any person who at the time sustains the relation to such state, corporation, county or minor, as would authorize the service of a summons upon him.

SEC. 256. The statement shall be filed with the clerk, and from the date of such filing, the court shall have jurisdiction of the controversy, as if the same were an action pending, after a special verdict found, and shall proceed to hear and determine the same accordingly.

TITLE XV.

Of the manner of giving and entering judgment.

SEC. 257. Judgment to be entered in journal, manner of entry.
258. If counter claim exceeds plaintiff's demand, judgment for defendant.
259. Judgment in actions for the recovery of personal property.
260. What entry to state in judgment for want of answer.
261. Judgment on demurrer.
262. When entry of judgment made.
263. Judgment notwithstanding the verdict.
264. When entry of judgment made, after motion for new trial decided in vacation.
265. Entry of judgment after the time prescribed.

SEC. 257. All judgments shall be entered by the clerk, subject to the direction of the court, in the journal; and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action. If entered in vacation, the entry shall be entitled and dated substantially as follows:

STATE OF OREGON, }
COUNTY OF ——— }

——— Court for the County of ———. In vacation, after the ——— Term, A. D., 186—. ——— the ——— A. D., 186—, as the fact may be, and such entry shall have the same effect, as if entered in term time.

SEC. 258. If a counter claim established at the trial exceed the plaintiff's demand so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

SEC. 259. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention thereof. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

SEC. 260. When judgment is given for want of answer, the entry shall state substantially, that the defendant has been duly served with the summons, and has failed to answer the complaint. When judgment is given on confession with or without action, on the report of referees, or on a controversy submitted without action, the entry shall state in like manner, the confession and assent thereto, the report of the referees, or agreed case, as the case may be.

SEC. 261. When a decision has been made sustaining or overruling a demurrer, unless the party against whom the decision is made, be allowed to amend or plead over, judgment shall be given for the plaintiff or defendant as the case may be, for such amount, or relief, or to such effect, as it appears from the pleading he is entitled to; but, if the cause is otherwise at issue upon a question of fact, the court may order the entry of judgment to be delayed, until such issue be tried or otherwise disposed of.

SEC. 262. When judgment is given in any of the cases mentioned in sections 260 and 261, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given. Except as in this section hereinafter provided, when a trial by the court has been had, judgment shall be entered by the clerk in conformity with the decision, within two days from the time the same is filed; or if the trial be by jury, judgment shall be given by the court in conformity therewith, and entered by the clerk within two days from the time the verdict has been received and in either case within the term at which such judgment is given:

1. When the court is in doubt what judgment ought to be given,

it may order the question to be reserved for argument or further consideration, and thereupon the entry of judgment shall be delayed, until judgment be given.

2. When within the time allowed to file a motion for new trial, either party shall file a motion for a particular judgment or for judgment notwithstanding the verdict or decision; or,

3. When a motion for new trial is filed within the time prescribed, the entry of judgment shall be thereby delayed until the motion is disposed of.

4. When upon a trial by the court, its decision is filed in vacation, the entry of judgment shall be delayed, until the expiration of the time prescribed, to file a motion for a new trial.

SEC. 263. When it appears from the pleadings, that the court has not jurisdiction of the subject of the action, or the person of the defendant, or that the facts stated in the pleadings of the plaintiff or defendant as the case may be, do not constitute a cause of action or defence thereto, and that such objection has not been taken by demurrer or answer; on motion, judgment shall be given for the plaintiff or defendant as the case may be, notwithstanding the verdict or decision.

SEC. 264. When a motion for new trial, for a particular judgment, or for a judgment notwithstanding the verdict, is decided in vacation, the decision shall be in writing, and filed with the clerk. Within the day of such filing, judgment shall be entered by the clerk in conformity with the decision.

SEC. 265. When the clerk is unable or omits to enter judgment within the time prescribed in this title; if the judgment has been given in vacation, it may be entered at any time thereafter, of the date which it is actually entered; if it has been given in term time, it may be entered at any time during the term, of the day's proceedings on which it should have been entered, or on motion of the party entitled, at any subsequent term, of the day on which it is actually entered.

TITLE XVI.

Lien of judgment and final record.

SEC. 266. Judgment to be lien from time of docketing.
267. Expiration of lien, when revived.
268. Judgment roll.
269. When final record ordered.

SEC. 266. Immediately after the entry of judgment in any action, the clerk shall docket the same in the judgment docket. At any time thereafter [illegible] ime an execution might issue upon such judgment, and the same remains unsatisfied in whole or in part, the plaintiff or in case of his death his representative may file a certified transcript of the original docket in the office of the county clerk of any county in this state. Upon the filing of such transcript, the clerk shall docket the same in the judgment docket of his office. From the date of docketing a judgment as in this title provided or the transcript thereof, such judgment shall be a lien upon all the real property of the defendant, within the county or counties where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon.

SEC. 267. Whenever, after the entry of judgment a period of five years shall elapse, without an execution being issued on such judgment, the lien thereof shall expire. If afterwards, leave is given to issue execution thereon, a transcript of the docket of order allowing the same may be docketed in any other county in the state, in the same manner as a judgment. From the date of docketing such order or a transcript thereof, the lien of the judgment shall begin anew and continue in all respects, as upon the first docketing the same.

SEC. 268. A conveyance of real property or any portion thereof or interest therein, shall be void as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment, or the transcript thereof as the case may be, or unless it be recorded within the time after its execution, provided by law, as between conveyances for the same real property.

SEC. 269. After docketing the judgment, and before the next regular term of the court, the clerk shall prepare and file in his office the judgment roll as provided in this section:

1. If the complaint has not been answered by any defendant, he shall attach together in the order of their filing issuing and entry, the complaint, summons and proof of service, and a copy of the entry of judgment.

2. In all other cases he shall attach together in like manner the summons and proof of service, the pleadings, bills of exceptions, all orders relating to a change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits, and necessarily affecting the judgment.

3. In all cases the clerk shall attach upon the outside of the

judgment roll, a blank sheet of paper, upon which he shall endorse, the name of the court, the term at which judgment was given, the names of the parties to the action and the title thereof, for whom judgment was given, the amount or nature thereof, and the date of its entry and docketing.

SEC. 270. Instead of the judgment roll prescribed in section 269, there shall be a final record made of the cause, as provided in this section:

1. When in any action, it shall appear that the title to real property or any interest therein, or any easement, franchise or right in or to the same, is directly determined or affected by the judgment therein, on motion of either party, the court shall order that a final record be made of the cause, and the expense of such record shall be taxed as other disbursements of the action.

2. In all other actions, on motion of either party, the court shall order that a final record be made of the cause, at the cost of the party moving for the same.

When a final record is ordered, it shall be made by the clerk within the time prescribed to prepare a judgment roll, by recording the papers and journal entries, required in such roll, in the order prescribed therefor.

CHAPTER III.

TITLE I.—*Of the execution.*
TITLE II.—*Proceedings after execution.*

TITLE I.

Of the execution.[1]

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303. Court may restrain waste prior to conveyance.
304. Who entitled to possession from time of sale to conveyance.

SEC. 271. The party in whose favor a judgment is given, which requires the payment of money, the delivery of real or personal property, or either of them, may at any time after the entry thereof have a writ of execution issued for its enforcement, as provided in this title.

SEC. 272. There shall be three kinds of executions; one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same.

SEC. 273. The writ of execution shall be issued by the clerk, and directed to the sheriff. It shall contain the name of the court, the names of the parties to the action and the title thereof, it shall substantially describe the judgment, and if it be for money, shall state the amount actually due thereon, and shall require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter;

2. If it be issued after the death of the judgment debtor, and be against real or personal property, it shall require the sheriff to satisfy the judgment with interest out of any property in the hands of the debtors [debtors], personal representatives, heirs, devisees, legatees, tenants of real property, or trustees as such.

3. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he shall pay the judgment with interest, or be discharged according to law;

4. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, charges, damages or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section, and in that respect it is to be deemed an execution against property.

SEC. 274. When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in this state. When it requires delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties.

SEC. 275. The sheriff shall indorse upon a writ of execution, the time when he received the same, and such execution shall be returnable, within sixty days after its receipt by the sheriff to the clerk's office from whence it issued.

SEC. 276. If the action be one in which the defendant might have been arrested as provided by section 106, an execution against the person of the judgment debtor, may be issued to any county within the state after the return of the execution against his property, unsatisfied in whole or in part as follows:

1. When it appears from the record that the cause of action is also a cause of arrest as prescribed in section 106, such execution may issue of course.

2. When no such cause of arrest appears from the record, such execution may issue for any of the causes prescribed in section 106, that may exist at the time of the application therefor, upon leave of the court or judge thereof.

3. When the defendant has been provisionally arrested in the action, or an order has been made allowing such arrest, and in either case the order has not been vacated, such execution may issue of course.

4. When execution is issued against the person of the defendant by leave of the court, it shall be applied for and allowed in the manner provided in section 107 for allowing a writ of arrest, except that the undertaking need not be for an amount exceeding the judgment. A defendant arrested on execution, who has not been arrested provisionally, may at any time be discharged from such arrest for the causes and in the manner provided in sections 128 and 129 for the discharge of a defendant who has been provisionally arrested.

SEC. 277. A person arrested on execution shall be imprisoned in the county jail, and kept at his own expense until satisfaction of the execution, or his legal discharge, but the plaintiff shall be liable in the first instance, for such expense as in other cases of arrest, in the same manner and to the same extent as prescribed in sections 126 and 127.

SEC. 278. Notwithstanding the death of a party after judgment, execution thereon against his property, or for the delivery of real or personal property, may be issued and executed in the same manner, and with the same effect, as if he were still living; but such execution shall not issue within six months from the granting letters testamentary or of administration upon the estate of such party without leave of the county court, or judge thereof.

SEC. 279. All property or right or interest therein of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent, at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him, and not otherwise.

1. Books, pictures, and musical instruments, owned by any person to the value of seventy-five dollars.

2. Necessary wearing apparel owned by any person to the value of one hundred dollars, and if such person be a householder, for each member of his family to the value of fifty dollars.

3. The tools, implements, apparatus, team, vehicle, harness or library, necessary to enable any person to carry on the trade, occupation or profession, by which such person habitually earns his living to the value of four hundred dollars. Also, sufficient quantity of food to support such team, if any, for sixty days. The word team in this subdivision, shall not be construed to include more than one yoke of oxen, or a pair of horses or mules, as the case may be.

4. The following property if owned by a householder and in actual use, or kept for use, by and for his family, or when being removed from one habitation to another on a change of residence: Ten sheep, with one year's fleece, or the yarn or cloth manufactured therefrom, two cows and five swine;—household goods, furniture and utensils, to the value of three hundred dollars. Also food sufficient to support such animals, if any, for three months, and provisions actually provided for family use, and necessary for the support of such householder and family for six months.

5. The seat or pew occupied by a householder, or his family, in a place of public worship.

6. All property of the state, or any county, incorporated city, town, or village therein, or of any other public or municipal corporation of like character.

7. No article of property, or if the same has been sold or exchanged, then neither the proceeds of such sale, or the article

received in exchange therefor shall be exempt from execution, issued on a judgment recovered for its price.

SEC. 280. When the writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows:

1. If property has been attached, he shall endorse on the execution, and pay to the clerk forthwith, the amount, if any, of the proceeds of sales of perishable property, or debts due the defendant received by him, sufficient to satisfy the judgment.

2. If the judgment is not then satisfied, and property has been attached and remains in his custody, he shall sell the same or sufficient thereof to satisfy the judgment.

3. If then any portion of the judgment remains unsatisfied, or if no property has been attached or the same has been discharged, he shall levy on the property of the judgment debtor sufficient to satisfy the judgment.

4. Property shall be levied on in like manner, and with like effect, as similar property is attached, as provided in sections 147, 148 and 150, omitting the filing of the certificate provided for in section 149.

5. Until a levy, property shall not be affected by the execution. When property has been sold or debts received by the sheriff on execution, he shall pay the proceeds thereof, or sufficient to satisfy the judgment, to the clerk by the day which the writ is returnable.

6. When property has been attached, and it is probable that such property will not be sufficient to satisfy the judgment, the execution may be levied on other property of the judgment debtor, without delay. If after satisfying the judgment, any property or the proceeds thereof, remain in the custody of the sheriff, he shall deliver the same to the judgment debtor.

SEC. 281. In the case of property in the possession of, or owing from any garnishee, mentioned in section 150 the sheriff shall proceed as follows:

1. If it appear from the certificate of the garnishee, that he is owing a debt to the judgment debtor which is then due, if such debt is not paid by such garnishee to the sheriff on demand, he shall levy on the property of the garnishee for the amount thereof, in all respects as if the execution was against the property of the garnishee. But if such debt be not then due, the sheriff shall sell the same according to the certificate as other property.

2. If in like manner, it appear that the judgment debtor has

rights or shares in the stock of the garnishee as provided in section 150, the sheriff shall sell the same according to the certificate as other property.

3. If in like manner, it appear, that the garnishee has other personal property of the judgment debtor in his possession, and the same has not been bailed to such garnishee for a period then unexpired, unless the same be delivered to the sheriff on demand, he shall levy upon the same wherever he may find it. But if such property is in the possession of such garnishee upon a bailment then unexpired, the sheriff shall sell the same, or the interest of the judgment debtor therein according to the certificate as other property.

SEC. 282. When a sheriff with an execution levies upon any of the personal property mentioned in subdivision 3, of section 147, and if the same is not delivered, paid, or transferred to him at the time, and the garnishee furnish him the certificate required in section 150, he shall proceed thereafter in reference to such property as provided in section 281. Such property may be delivered paid or transferred to the sheriff at the time of levy or sufficient thereof to satisfy the execution, and the sheriff's receipt to the person, association or corporation as the case may be shall be a sufficient discharge therefor.

SEC. 283. When personal property shall be seized by virtue of any execution, and any person other than the defendant, shall claim such property or any part thereof, and shall give notice thereof in writing, the sheriff may summon from his county six persons, qualified as jurors between the parties, to try the validity of the claim, giving five days' notice of the time and place of the trial to the plaintiff in the execution or his attorney.

SEC. 284. The sheriff, at the request of either party, shall subpœna witnesses and compel them to attend and give testimony, and he shall administer the necessary oaths to the jurors and witnesses. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses, and the verdict of such jury being rendered in writing, and signed by the foreman, shall be a full indemnity to the sheriff, proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possesion of such property, or for damages for taking the same.

SEC. 285. The claimant at any time before the jury retire, may withdraw his claim, or the plaintiff in the writ, may within the same time direct the sheriff to discharge the property from the execution, and thereupon, the trial shall proceed no further. The costs and disbursements of the trial shall be paid by the party against whom the verdict is given, or if no verdict be given, as in this section provided, then by the party who withdrew his claim, or directed the property to be discharged, as the case may be. The sheriff shall collect all such costs and disbursements, if not paid immediately, by levying on the property of the party liable for them, as on execution, and pay the same, to the jurors, witnesses and others entitled to receive them.

SEC. 286. Notwithstanding the verdict of the jury be for the claimant, yet the sheriff shall proceed to sell the property seized in satisfaction of the execution, if the plaintiff tender to him a written undertaking, excecuted by two or more good and sufficient sureties, residents of the state, and householders or freeholders therein, in double the value of the property, to the effect that he will indemnify the sheriff against all damages and costs, which he may sustain in consequence of the seizure and sale of such property, and moreover, that he will pay to the claimant of such property, all damages which he may sustain in consequence of such seizure and sale. If such undertaking be given it shall be returned by the sheriff with the execution.

SEC. 287. When the sheriff shall levy upon personal property by virtue of an execution, he may permit the judgment debtor, to retain the same, or any part thereof in his possession until the day of sale, upon the defendant executing a written undertaking to the sheriff with sufficient surety, in double the value of such property, to the effect that it shall be delivered to the sheriff at the time and place of sale, and for non-delivery thereof, an action may be maintained upon such undertaking by the sheriff or the plaintiff in the execution; but the sheriff shall not thereby be discharged from his liability to the plaintiff for such property.

SEC. 288. Before the sale of property on execution, notice thereof shall be given as follows:

1. In case of personal property, by posting written or printed notice of the time and place of sale, in three public places of the county where the sale is to take place, not less than ten days successively;

2. In case of real property, by posting a similar notice, particularly describing the property, for four weeks successively, in three public places of the county, where the property is to be sold, and

publishing a copy thereof once a week, for the same period, in a newspaper of the county, if there be one, or if there be none, then in a newspaper published nearest to the place of sale; or in the newspaper published by the state printer.

SEC. 289. All sales of property upon execution shall be made by auction, between nine o'clock in the morning and four o'clock in the evening. After sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery and not in the possession of a third person, association, or corporation, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price, and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately or otherwise as is likely to bring the highest price, or when a portion of such real property is claimed, by a third person, and he requires it to be sold separately, such portion shall be sold separately. Sales of real property shall be made at the court house door.

SEC. 290. If at the time appointed for the sale, the sheriff should be prevented from attending at the place appointed, or being present should deem it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week, next after the day appointed, and so from time to time for the like cause, giving notice of every adjournment by public proclamation, made at the same time. The sheriff for like causes, may also adjourn the sale from time to time, not exceeding thirty days beyond the day at which the writ is made returnable, with the consent of the plaintiff endorsed upon the writ.

SEC. 291. When the purchaser of any personal property capable of manual delivery, and not in the possession of a third person association or corporation, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired shall give him a bill of sale containing an acknowledgment of the payment. In all other sales of personal property, the sheriff shall give the purchaser a bill of sale with the like acknowledgement.

SEC. 292. Whenever, after the entry of judgment, a period of five years shall elapse, without an execution being issued on such judgment thereafter an execution shall not issue except as in this section provided:

1. The party in whose favor a judgment is given, shall file a motion with the clerk of the court where the judgment is entered, for leave to issue an execution. The motion shall state the names of the parties to the judgment, the date of its entry, and the amount claimed to be due thereon, or the particular property of which the possession was thereby adjudged to such party remaining undelivered. The motion shall be subscribed and verified in like manner as a complaint in an action at law.

2. At any time after filing such motion, the party may cause a summons to be served on the judgment debtor in like manner and with like effect, as in an action at law. In case such judgment debtor be dead, the summons may be served upon his representatives, by publication as in case of a non-resident, or by actual service of the summons.

3. The summons shall be substantially the same as in an action at law, but instead of the notice therein required, it shall state the amount claimed or the property sought to be recovered, in the manner prescribed in subdivision 1 of this section.

4. The judgment debtor, or in case of his death, his representatives, may file an answer to such motion, within the time allowed to answer a complaint in an action at law, alleging any defence to such motion which may exist. If no answer be filed within the time prescribed, the motion shall be allowed of course. The moving party may demur or reply to the answer. The party opposed to the motion may demur to the same or the reply. The pleadings shall be subscribed and verified, and the proceedings conducted as in an action at law.

5. The word representatives in this section, shall be deemed to include, any or all of the persons mentioned in subdivision 2 of section 273, in whose possession property of the judgment debtors, may be, which is liable to be taken and sold or delivered in satisfaction of the execution, and not otherwise.

6. The order shall specify the amount for which execution is to issue, or the particular property, possession of which is to be delivered; it shall be entered in the journal and docketed as a judgment and a roll thereafter prepared and filed, or a final record made of the proceedings, as the case may be, in the same manner as a judgment.

SEC. 293. Whenever real property is sold on execution, the provisions of this section shall apply to the subsequent proceedings:

1. The plaintiff in the writ of execution shall be entitled, on

motion therefor, to have an order confirming the sale, at the term next following the return of the execution, or if it be returned in term time then at such term; unless the judgment debtor, or in case of his death his representative, shall file with the clerk ten days before such term, or if the writ be returned in term time, then five days after the return thereof, his objections thereto.

2. If such objections be filed, the court shall notwithstanding allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear, that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case the court shall disallow the motion, and direct that the property be resold in whole or in part as the case may be, as upon an execution received of that date.

3. Upon the return of the execution, the sheriff shall pay the proceeds of the sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment. If an order of resale be afterwards made and the property sell for a greater amount to any person, other than the former purchaser, the clerk shall first repay to such purchaser, the amount of his bid, out of the proceeds of the latter sale.

4. Upon a resale, the bid of the purchaser at the former sale, shall be deemed to be renewed and continue in force, and no bid shall be taken except for a greater amount. If the motion to confirm be not heard and decided at the term at which it is made it may be continued and heard and determined before the judge, or at any term thereafter. An order confirming a sale, shall be a conclusive determination, of the regularity of the proceedings concerning such sale, as to all persons, in any other action, suit or proceeding whatever.

5. If after the satisfaction of the judgment, there be any proceeds of the sale remaining, the clerk shall pay such proceeds to the judgment debtor, or his representative, as the case may be, at any time before the order is made; upon the motion to confirm the sale, provided such party file with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale; but, if the sale be confirmed, such proceeds shall be paid to such party of course, otherwise they shall remain in the custody of the clerk, until the sale of the property has been disposed of.

SEC. 294. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of the reversal of the judgment, he may recover the price paid with interest and the costs and disbursements of the suit by which he was evicted, from the plaintiff in the writ of execution.

SEC. 295. When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pays without a sale, more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation or contract of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel re-payment from the principal. In such cases, the person so paying or contributing, shall be entitled to the benefit of the judgment to enforce contribution or re-payment, if within thirty days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or re-payment; upon filing such notice, the clerk shall make an entry thereof in the margin of the docket where the judgment is entered.

SEC. 296. Upon a sale of real property, when the estate is less than a leasehold of two years unexpired term, the sale shall be absolute. In all other cases such property shall be subject to redemption, as hereinafter provided, in this title. At the time of sale the sheriff shall give to the purchaser, a certificate of the sale, containing:

1. A particular description of the property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption, it shall be so stated. The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ.

SEC. 297. Property sold subject to redemption, as provided in the last section, or any part thereof separately sold, may be redeemed by the following persons or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property separately sold.

2. A creditor having a lien by judgment, decree, or mortgage on any portion of the property, or any portion of any part thereof, separately sold; subsequent in time to that on which the property was sold.

The persons mentioned in the 2d subdivision of this section, after having redeemed the property are to be termed redemptioners.

SEC. 298. A lien creditor may redeem the property within sixty days from the date of the order confirming the sale, by paying the amount of the purchase money with interest at the rate of two per cent. per month thereon from the time of sale, together with the amount of any taxes which the purchaser may have paid thereon, and if the purchaser be also a creditor having a lien prior to that of the redemptioner, the amount of such lien with interest.

SEC. 299. If the property be so redeemed, any other lien creditor may within sixty days from the last redemption, again redeem it on paying the sum paid on the last redemption with interest at the rate of two per cent. per month thereon from the date of the last preceding redemption in addition, together with the amount of any taxes, which the last redemptioner may have paid thereon, and unless his lien be prior to that of such redemptioner, the amount of such lien with interest. The property may be again, and as often as any lien creditor or redemptioner is disposed, redeemed from the last previous redemptioner, within sixty days from the date of the last redemption, on paying the sum paid on the last previous redemption, with interest at the rate of two per cent. per month thereon, from the date of such previous redemption, together with the amount of any taxes paid thereon by such last redemptioner, and the amount of any liens held by such last redemptioner, prior to his own with interest.

SEC. 300. The judgment debtor or his successor in interest may redeem the property at any time prior to the confirmation of sale, on paying the amount of the purchase money, with interest at the rate of two per cent. per month thereon from the date of the sale, together with the amount of any taxes which the purchaser may have paid thereon after the purchase. But if the judgment debtor do not redeem until after the confirmation of the sale, thereafter he shall redeem within the time and upon the terms allowed to a lien creditor, and not otherwise.

SEC. 301. If no redemption be made within sixty days from the confirmation of the sale, the purchaser shall be entitled to a conveyance from the sheriff, or if so redeemed, whenever sixty days shall have elapsed, and no other redemption has been made, the time for redemption shall have expired, and the last redemptioner shall be entitled to a conveyance from the sheriff. If the judgment debtor redeem at any time before the time for redemption expires, the effects of the sale shall be terminated, and he shall be restored to his estate.

SEC. 302. The mode of redeeming shall be as provided in this section:

1. The person seeking to redeem, shall give the purchaser or redemptioner, as the case may be, two days notice of his intention to apply to the sheriff for that purpose. At the time and place specified in such notice, such person may redeem by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate as in case of sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. A party seeking to redeem shall submit to the sheriff the evidence of his right thereto, as follows:

1. Proof that the notice required by this section, has been given to the purchaser or redemptioner or waived.

2. If he be a lien creditor, a copy of the docket of the judgment, or decree under which he claims the right to redeem, certified by the clerk of the court where such judgment or decree is docketed, or if he seek to redeem upon a mortgage, the certificate of the record thereof.

3. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent. An affidavit by himself or agent, showing the amount then actually due on the judgment, decree or mortgage.

4. If the redemptioner or purchaser, have a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the like evidence thereof and of the amount due thereon, or the same may be disregarded.

When two or more persons apply to the sheriff to redeem at the same time, he shall allow the person having the prior lien to redeem first and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed, if he attend at the redemption, or if not at any time thereafter when demanded. Where a sheriff shall wrongfully refuse to allow any person to redeem, his right thereto shall not be prejudiced thereby, and upon the submission of the evidence and the tender of the money to the sheriff as herein provided, he may be required by order of the court or judge thereof to allow such redemption.

SEC. 303. Until the expiration of the time allowed for redemption, the court or judge thereof may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or judgment creditor, but it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs to buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family while he occupies the property.

Sec. 304. The purchaser from the day of sale, until a resale, or a redemption, and a redemptioner from the day of his redemption until another redemption shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case, shall be entitled to receive from such tenant, the rents or the value of the use and occupation thereof, during the same period.

TITLE II.

Proceedings after execution.

Sec. 305. Order to examine judgment debtor.
306. Examination of judgment debtor, and proceedings thereon.
307. Restraining order against judgment debtor.
308. When judgment debtor may be arrested.
309. Order to examine garnishee, and proceedings thereon.
310. What earnings of a judgment debtor exempt.
311. What officers not liable to answer as garnishee.

Sec. 305. After the issuing of an execution against property, and upon proof by the affidavit of the plaintiff in the writ, or otherwise, to the satisfaction of the court or judge thereof, that the judgment debtor has property liable to execution, which he refuses to apply towards the satisfaction of the judgment, such court or judge may by an order require the judgment debtor to appear and answer under oath concerning the same, before such court or judge, or before a referee, appointed by such court or judge, at a time and place specified in the order.

Sec. 306. On the appearance of the judgment debtor, he may be examined on oath concerning his property. His examination if required by the plaintiff in the writ, shall be reduced to writing, and filed with the clerk by whom the execution was issued. Either party may examine witnesses in his behalf, and if by such examination it appear, that the judgment debtor has any property liable to execution, the court or judge before whom the proceeding takes place, or to whom the report of the referee is made, shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment, or that such property be levied on by execution, in the manner and with the effect, as provided in title I. of this chapter; or both, as may seem most likely to affect the object of the proceeding.

SEC. 307. At the time of allowing the order prescribed in section 305 or at any time thereafter pending the proceeding, the court or judge may make an order restraining the judgment debtor from selling, transferring or in any manner disposing of any of his property liable to execution, pending the proceeding. Disobedience to any order or requirement authorized by sections 305, 306, and 307 on the part of the judgment debtor may be punished as for a contempt.

SEC. 308. Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the court or judge may, upon proof by affidavit of a party or otherwise, to his satisfaction, that there is danger of the debtor leaving the state, or concealing himself therein, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before the court or judge; upon being brought before the court or judge, he may be examined on oath, and if it then appear that there is danger of the debtor leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking with one or more sureties, that he will from time to time attend before the court or judge as may be directed, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to the jail of the county by warrant of the judge.

SEC. 309. Whenever the sheriff with an execution against the property of the judgment debtor shall apply to any person or officer mentioned in subdivision 3 of section 147, for the purpose of levying on any property therein mentioned, such person or officer shall forthwith give to the sheriff a certificate in the manner prescribed in section 150. If such person or officer refuse to do so, or if the certificate be unsatisfactory to the plaintiff in the writ, he may in like manner, have the order prescribed in such section against such person or officer. Thereafter the proceeding upon such order shall be conducted in the manner prescribed in title XIV. of chapter I. from section 160 to section 169 inclusive.

SEC. 310. The earnings of a judgment debtor for personal services, at any time within thirty days next preceding the judgment against a garnishee, shall not be included in such judgment, when it shall be made to appear by the affidavit of the judgment debtor, or otherwise, that such earnings are necessary for the use of a family, supported wholly or partly by his labor.

SEC. 311. No state or county treasurer, sheriff, clerk, constable, or other public officer, shall be liable to answer as garnishee for moneys in his possession as such public officer, belonging to, or claimed by any judgment debtor.

CHAPTER IV.

Of actions at law in particular cases.

SEC. 312. The mode of proceeding in the actions provided for in this chapter, from the commencement to the determination thereof, and thereafter until satisfaction of the judgment be had, shall be according to the general provisions of this code upon the subject of actions at law, except as herein otherwise or specially provided.

TITLE I.—*Actions to recover the possession of real property.*

TITLE II.—*Actions for nuisance, waste, and trespass on real property.*

TITLE III.—*Actions on official undertakings, and for fines and forfeitures.*

TITLE IV.—*Actions by and against public corporations and officers.*

TITLE V.—*Actions to vacate charters, and letters patent, and to determine the right to an office or franchise.*

TITLE VI.—*Actions by and against executors and administrators.*

TITLE I.

Actions to recover possession of real property.

SEC. 313. Who may bring such action, and against whom.
314. When landlord may be made defendant in place of tenant.
315. What to be pleaded in complaint.
316. Defendant not to be allowed to give in evidence certain matters unless pleaded in the answer. Judgment against conclusive against landlord.
317. What the jury shall find by their verdict.
318. What damages may be recovered, and when the value of permanent improvements may be set off against such damages.
319. Verdict, when right of possession expires after commencement of action.
320. Order to make survey of the property.
321. Same subject.
322. Action not to be prejudiced by alienation of person in possession.
323. Mortgagee cannot maintain action against mortgagor.
324. Action by tenant in common or for dower, what must be shown.
325. Action against lessee, on failure to pay rent.
326. When judgment conclusive, and upon whom.
327. Possession not to be affected by order allowing new trial.
328. Admeasurement of dower after judgment.

SEC. 313. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same by an action at law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof.

SEC. 314. A defendant who is in actual possession, may for answer plead, that he is in possession only as tenant of another, naming him, and his place of residence, and thereupon, the landlord if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him. If the landlord do not apply to be made defendant within the day the tenant is allowed to answer, thereafter he shall not be allowed to, but, he shall be made defendant if the plaintiff require it. If the landlord be made defendant on motion of the plaintiff he shall be required to appear and answer, within ten days from notice of the pendency of the action and the order making him defendant, or such further notice as the court or judge thereof may prescribe.

SEC. 315. The plaintiff in his complaint, shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered, if a recovery be had.

SEC. 316. The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof unless the same be pleaded in his answer. If so pleaded the nature and duration of such estate, or license or right to the possession, shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant the judgment shall be conclusive against a landlord, who has been made defendant in place of the tenant, to the same extent as if the action had been originally commenced against him.

SEC. 317. The jury by their verdict shall find as follows:

1. If the verdict be for the plaintiff, that he is entitled to the

possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be.

2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof, as the defendant defends for, and the estate in such property or part thereof, or license or right to the possession of either, established on the trial by the defendant, if any; in effect as the same is required to be pleaded.

SEC. 318. The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement, to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value thereof at the time of trial, shall be allowed as a set-off against such damages.

SEC. 319. If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages.

SEC. 320. The court or judge thereof, on motion, and after notice to the adverse party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy, and make survey and admeasurement thereof, for the purposes of the action.

SEC. 321. The order shall describe the property, and a copy thereof shall be served upon the defendant, and thereupon the party may enter upon the property, and make such survey and admeasurement, but if any unnecessary injury be done to the premises, he shall be liable therefor.

SEC. 322. An action for the recovery of the possession of real property against a person in possession, cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action; but if such alienation be made after the commencement of the action, and the defendant do not satisfy the judgment recovered for damages, for withholding the possession, such damages may be recovered by action against the purchaser.

SEC. 323. A mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law.

SEC. 324. In an action for the recovery of dower before admeasurement, or by a tenant in common of real property against a co-tenant, the plaintiff shall show in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right, or did some act amounting to such denial.

SEC. 325. When in case of a lease of real property, and the failure of tenant to pay rent, the landlord has a subsisting right to re-enter for such failure, he may bring an action to recover the possession of such property, and such action is equivalent to a demand of the rent, and a re-entry upon the property. But, if at any time before judgment in such action, the lessee or his successor in interest, as to the whole or a part of the property, pay to the plaintiff, or bring into court the amount of rent then in arrear with interest, and the costs of the action, and perform the other covenants or agreements on the part of the lessee, he shall be entitled to continue in the possession, according to the terms of the lease.

SEC. 326. In an action to recover the possession of real property the judgment therein, shall be conclusive as to the estate in such property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the same is given, and against all persons claiming from, through, or under such party, after the commencement of such action, except as in this section provided. When service of the summons is made by publication and judgment is given for want of answer, at any time within two years from the entry thereof, the defendant or his successor in interest as to the whole or any part of the property, shall upon application to the court or judge thereof, be entitled to an order vacating the judgment and granting him a new trial, upon the payment of the costs of the action.

SEC. 327. If the plaintiff has taken possession of the property before the judgment is set aside and a new trial granted as provided in section 326, such possession shall not be thereby affected in any way, and if judgment be given for the defendant in the new trial, he shall be entitled to restitution by execution in the same manner as if he were plaintiff.

SEC. 328. In an action to recover the possession of real property by a tenant in dower, or his successor in interest, if such estate in dower has not been admeasured before the commencement of the action, the plaintiff shall not have execution to deliver the possession thereof, until the same be admeasured, as follows:

1. At any time after the entry of judgment in favor of the plaintiff, he may upon notice to the adverse party, move the court for the appointment of referees, to admeasure the dower out of the real property, of which the possession is recovered by the action. The court shall allow such motion, unless it appear probable on the hearing that a partition of such property cannot be made without prejudice to the interests of the other owners. In the latter case, the court shall disallow the motion, and thereafter the plaintiff shall only proceed for partition or sale of such real property as provided in title V. of chapter V.

2. If the court allow the motion, thereafter the proceedings shall be conducted as provided in such title.

At any time after the confirmation of the report of the referees, the plaintiff may have execution for the delivery of the possession of the property according to the admeasurement thereof, and for the damages recovered, if any, for withholding the same, if such damages remain unsatisfied.

3. If the motion for admeasurement, be made at the term at which judgment was given, the notice thereof shall be served on the adverse party such time as the court by general rule, or special order may prescribe.

SEC. 329. In an action at law for the recovery of the possession of real property, if either party claim the property as a donee of the United States, under the act of Congress, approved, September 27th, A. D., 1850, commonly called the Donation law, or the acts amendatory thereof, such party from the date of his settlement thereon, as provided in said acts, shall be deemed to have a legal estate in fee in such property, to continue upon the condition that he perform the conditions required by such acts, which estate is unconditional and indefeasible after the performance of such conditions. In such action, if both plaintiff and defendant claim title to the same real property, by virtue of settlement under such acts, such settlement and the performance of the subsequent conditions, shall be conclusively presumed, in favor of the party having or claiming under the elder patent certificate, or patent as the case may be, unless it appear upon the face of such certificate or patent, that the same is absolutely void.

TITLE II.

Actions for nuisance, waste, and trespass on real property.

SEC. 330. Private nuisance, and action therefor. When warrant allowed to abate it.
331. How warrant issued, and mode of proceeding under.
332. When defendant may have stay of warrant.
333. Sureties on undertaking when to justify.
334. Action for waste, and judgment therein.
335. Actions for trespass in particular cases, and of judgment therein.
336. Same subject.

SEC. 330. Any person whose property is affected by a private nuisance, or whose personal enjoyment thereof, is in like manner thereby affected, may maintain an action at law for damages therefor. If judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order, allowing a warrant to issue to the sheriff, to abate such nuisance. Such motion must be made at the term at which judgment is given, and shall be allowed of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may proceed in equity to have the defendant enjoined.

SEC. 331. If the order be made, the clerk shall thereafter at any time within six months, when requested by the plaintiff, issue such warrant directed to the sheriff, requiring him forthwith to abate the nuisance at the expense of the defendant, and return the warrant as soon thereafter as may be, with his proceedings endorsed thereon. The expense of abating the nuisance may be levied by the sheriff on the property of the defendant, and in this respect the warrant is to be deemed an execution against property.

SEC. 332. At any time before the order is made or the warrant issues, the defendant may on motion to the court or judge thereof, have an order to stay the issuing of such warrant, for such period as may be necessary, not exceeding six months, to allow the defendant to abate the nuisance himself, upon his giving an undertaking to the plaintiff in a sufficient amount, with one or more sureties to the satisfaction of the court or judge thereof, that he will abate it within the time and in the manner specified in such order.

Sec. 333. If the plaintiff is not notified of the time and place of the application for the order provided for in section 332, the sureties therein provided for, shall justify as bail upon arrest, otherwise such justification may be omitted unless the plaintiff require it. If such order be made and undertaking given, and the defendant fails to abate such nuisance within the time specified in such order, thereafter, at any time within six months, the warrant for the abatement of the nuisance, may issue, as if the same had not been stayed.

Sec. 334. If a guardian, tenant in severalty or in common for life or for years, of real property, commit waste thereon, any person injured thereby, may maintain an action at law for damages therefor, against such guardian or tenant; in which action there may be judgment, for treble damages, forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion, is determined in the action, to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice.

Sec. 335. Whenever any person shall cut down, girdle or otherwise injure, or carry off, any tree, timber, or shrub on the land of another person, or on the street or highway, in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons, or public grounds, of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed therefor, as the case may be.

Sec. 336. If upon the trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed, was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.

TITLE III.

Actions on official undertakings, and for fines and forfeitures.

SEC. 337. Official undertakings, to whom deemed a security.
338. Who may maintain action thereon.
339. When leave must be obtained before action can be commenced.
340. Judgment no bar to action for another delinquency.
341. Judgment cannot be given against surety for more than the amount of the penalty, or so much thereof as remains unrecovered.
342. Who may maintain action for fines and forfeitures.

SEC. 337. The official undertaking, or other security of a public officer to the state, or to any county, city, town or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation as the case may be, and also, to all persons severally for the official delinquencies, against which it is intended to provide.

SEC. 338. When a public officer by official misconduct or neglect of duty, shall forfeit his official undertaking or other security, or render his sureties therein liable upon such undertaking or other security, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name, against the officer, and his sureties, to recover the amount, to which he may by reason thereof, be entitled.

SEC. 339. Before an action can be commenced by a plaintiff, other than than the state, or the municipal or public corporation named in the undertaking or other security, leave shall be obtained of the court or judge thereof, where the action is triable. Such leave shall be granted upon the production of a certified copy of the undertaking or other security, and an affidavit of the plaintiff or some person on his behalf, showing the delinquency. But if the matters set forth in the affidavit, be such, that if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant on motion shall be entitled to judgment of non-suit, if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly.

SEC. 340. A judgment in favor of a party for one delinquency shall not preclude the same or another party from maintaining another action on the same undertaking or other security for another delinquency.

SEC. 341. In an action upon an official undertaking or other security, if judgments have already been recovered against the surety therein, other than by confession, equal in the aggregate to the penalty or any part thereof of such undertaking or other security, and if such recovery be established on the trial, judgment shall not be given against such surety for an amount exceeding such penalty, or such portion thereof as is not already recovered against him.

SEC. 342. Fines and forfeitures may be recovered by an action at law in the name of the officer or person to whom they are by law given, or in the name of the officer or person who by law is authorized to prosecute for them.

SEC. 343. When an action shall be commenced for a penalty, which by law is not to exceed a certain amount, the action may be commenced for that amount, and if judgment be given for the plaintiff, it may be for such amount or less in the discretion of the court, in proportion to the offence.

SEC. 344. A recovery of a judgment for a penalty or forfeiture by collusion between the plaintiff and defendant, with intent to save the defendant, wholly or partially, from the consequences contemplated by law, in case when the penalty or forfeiture is given wholly or partly to the person who prosecutes, shall not bar the recovery of the same by another person.

SEC. 345. Fines and forfeitures not specially granted or otherwise appropriated by law, when recovered, shall be paid into the treasury of the proper county. Whenever by the provisions of law, any property real or personal shall be forfeited to the state, or to any officer for its use, the action for the recovery of such property may be commenced in any county where the defendant may be found, or where such property may be.

TITLE IV.

Actions by and against public corporations, and officers.

SEC. 346. How actions may be maintained against public corporations and for what causes.
347. Actions against public corporations, and what causes.
348. How pleadings of public corporations verified.
349. How judgment against public corporation satisfied.
350. Actions by and against public officers, when maintained, and for what causes.

SEC. 346. An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases:

1. Upon a contract made with such public corporation.

2. Upon a liability prescribed by law in favor of such public corporation.

3. To recover a penalty or forfeiture given to such public corporation.

4. To recover damages for an injury to the corporate rights or property of such public corporation.

SEC. 347. An action may be maintained against a county or other of the public corporations mentioned or described in section 346, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff, arising from some act or omission of such county or other public corporation.

SEC. 348. In such actions the pleadings of the public corporation, shall be verified by any of the officers representing it in its corporate capacity, in the same manner as if such officer were a defendant in the action, or by the agent or attorney thereof, as in ordinary actions.

SEC. 349. If judgment be given for the recovery of money or damages against a county or other public corporation, mentioned or described in section 346, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect, shall be satisfied as follows:

1. The party in whose favor such judgment is given, may, at any time thereafter, when an execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof, to the officer of such county or other public corporation, who is authorized to draw orders on the treasurer thereof.

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2. On the presentation of such transcript, such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment, and paid, with like effect and in like manner, as other orders upon the treasurer of such county or other public corporation.

3. The certified transcript herein provided for, shall not be furnished by the clerk, unless at the time an execution might issue on such judgment if the same were against a private person, nor until satisfaction of the judgment in respect to such money or damages be acknowledged as in ordinary cases. The clerk shall include in the transcript a memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contain such memorandum no order upon the treasurer shall issue thereon.

SEC. 350. An action at law may be maintained by and against any public officer in this state in his official character, when as to such cause of action, such officer does not represent any of the public corporations mentioned or described in section 346, for any of the causes specified in such section and section 147. If judgment be given against any such officer in such action, it may be enforced against him personally, and the amount thereof shall be allowed to him in his official accounts.

TITLE V.

Actions to avoid charters, letters patent, and to prevent the usurpation of an office or franchise, and determine the right thereto.

SEC. 351. Scire facias and quo warranto abolished.
352. Action against public or private corporation, to be commenced on the direction of Governor.
353. Action to annul the existence of corporation.
354. Action for the usurpation of office or franchise.
355. Action to vacate or annul letters patent.
356. Who to prosecute actions, pleadings by whom verified, how leave granted, and who deemed coplaintiff with state.
357. Duty of prosecuting attorney as to commencing actions.
358. When relator's right may be pleaded and determined by the action.
359. If judgment be given in favor of relator, what he may do.
360. Relator after judgment, may have action for damages.
361. Actions against several persons claiming office or franchise.
362. Judgment against usurper. Court may fine him.
363. Judgment against corporation.
364. How judgments enforced.

SEC. 351. The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished, and the remedies heretofore obtainable under those forms may be obtained by action at law in the mode prescribed in this title.

SEC. 352. An action at law may be maintained in the name of the state, whenever the governor thereof shall so direct, against a corporation either public or private for the purpose of avoiding the act of incorporation, or the act of renewing or modifying its corporate existence, on the ground that such act or either of them was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporated, or some of them, or with their knowledge and consent, or for annulling the existence of such corporation, when the same has been formed under any general law of this state therefor, on the ground that such incorporation, or any renewal or modification thereof, was procured in like manner.

SEC. 353. An action at law may be maintained in the name of the state against a corporation, other than a public one, on leave granted by the court or judge thereof where the action is triable, for the purpose of avoiding the charter or annulling the existence of such corporation, whenever it shall:

1. Offend against any of the provisions of the acts, or either of them, creating, renewing or modifying such corporation, or the provisions of any general law under which it became incorporated; or,
2. Violate the provisions of any law, by which such corporation forfeits its charter, by abuse of its powers; or
3. Whenever it has forfeited its privileges or franchises, by failure to exercise its powers; or
4. Whenever it has done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or
5. Whenever it exercises a franchise or privilege not conferred upon it by law.

SEC. 354. An action at law may be maintained in the name of the state, upon the information of the prosecuting attorney, or upon the relation of a private party against the person offending, in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation either public or private, created or formed by or under the authority of this state; or

2. When any public officer, civil or military, has done, or suffered an act which, by the provisions of law, makes a forfeiture of his office; or

3. When any association or number of persons act within this state, as a corporation, without being duly incorporated.

SEC. 355. An action at law may be maintained in the name of the state for the purpose of vacating or annulling letters patent, issued by the state, against the person to whom the same were issued, or those claiming under him, as to the subject matter thereof, in the following cases:

1. When such letters patent were issued by means of some fraudulent suggestion or concealment of a material fact by the person to whom the same were issued, or with his knowledge and consent; or

2. When such letters patent were issued through mistake, or in ignorance of a material fact; or

3. When the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were issued, or have by any other means forfeited the interest acquired under the same.

SEC. 356. The actions provided for in this title, shall be commenced and prosecuted by the prosecuting attorney of the district where the same are triable. When the action is upon the relation of a private party, as allowed in section 354, the pleadings on behalf of the state shall be verified by such relator, as if he were the plaintiff in the action, or otherwise as provided in section 79, in all other cases such pleadings shall be verified by the prosecuting attorney in like manner, or otherwise as provided in such section. When an action can only be commenced by leave as provided in section 353, such leave shall be granted when it appears by affidavit that the acts or omissions in such section specified have been done or suffered by such corporation. When an action is commenced on the information of a private person as allowed in section 354, having an interest in the question, such party for all the purposes of the action, and as to the effect of any judgment that may be given therein, shall be deemed a co-plaintiff with the state.

SEC. 357. When directed by the Governor as prescribed in section 352, it shall be the duty of the prosecuting attorney to commence the action therein provided for accordingly. In all other actions provided for in this title it shall be the duty of the proper prosecuting attorney to commence such action, upon leave given where leave is required, in every case of public interest, whenever he has reason to believe that a cause of action exists and can be proven, and also for like reasons in every case of private interest only, in which satisfactory security is given to the state to indemnify it against the costs and expenses that may be incurred thereby.

SEC. 358. Whenever an action is brought against a person for any of the causes specified in subdivision 1 of section 354, the prosecuting attorney, in addition to the statement of the cause of action, may also separately set forth in the complaint the name of person rightfully entitled to the office or franchise, with a statement of the facts constituting his right thereto. In such case judgment may be given upon the right of the defendant, and also upon the right of the person, so alleged to be entitled, or only upon the right of the defendant, as justice may require.

SEC. 359. If judgment be given upon the right of the person, so alleged to be entitled, and the same be in favor of such person, he shall be entitled to the possession and enjoyment of such franchise, or to take upon himself the execution of such office, after qualifying himself therefor as required by law, and to demand and receive the possession of all the books, papers and property of whatever nature belonging thereto.

SEC. 360. If judgment be given upon the right, and in favor of the person; so alleged to be entitled, he may afterwards maintain an action to recover the damages which he may have sustained by reason of the premises. In such action the defendant may be arrested and held to bail in the same manner and with like effect as in other actions at law where the defendant is subject to arrest.

SEC. 361. Several persons may be joined as defendants in an action for the causes specified in subdivision 1 of section 354, and in such action their respective rights to such office or franchise may be determined.

SEC. 362. When a defendant whether a natural person or a corporation, against whom an action has been commenced for any of the causes specified in subdivision 1 of section 354, is determined to be guilty of usurping, or intruding into, or unlawfully holding or exercising any office or franchise, judgment shall be given that such defendant be excluded therefrom. The court may also in its discretion impose a fine upon the defendant not exceeding two thousand dollars.

Sec. 363. If it be determined that a corporation, against which an action has been commenced pursuant to this title, has forfeited its corporate rights, privileges and franchises, judgment shall be given that such corporation be excluded therefrom, and that the corporation be dissolved.

Sec. 364. If judgment be given against a corporation, the effect of which is, that such corporation ceases to exist, or whereby any letters patent are determined to be vacated or annulled, it shall be the duty of the prosecuting attorney to cause a copy of the judgment roll to be filed in the office of the Secretary of State.

Sec. 364. A judgment given in any action provided for in this title, in respect to costs and disbursements may be enforced by execution as a judgment which requires the payment of money, and in all other respects obedience thereto may be enforced by attachment of the body of the defendant, or if the defendant be a corporation the body of any or all of the officers or members of such corporation refusing or neglecting obedience thereto.

TITLE VI.

Actions by and against executors or administrators.

Sec. 365. What causes of action do not survive.
366. What causes of action do survive.
367. When death ensues from an injury.
368. Representatives regarded as one person in an action.
369. Judgment on failure to answer, when evidence of assets.
370. Inventory as evidence, and how it may be contradicted or avoided.
371. Executor of his own wrong not liable, as such.
372. Executor of executor no authority over estate.
373. When actions may be commenced.
374. Claim must be first presented to executor or administrator.
375. When provisional remedies allowed against executors or administrator.

Sec. 365. A cause of action arising out of an injury to the person, dies with the person of either party, except as provided in section 367. But the provisions of this title shall not be construed so as to abate, the action mentioned in section 38, or to defeat or prejudice the right of action given by section 33.

Sec. 366. All other causes of action, by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former, and against the personal representatives of the the latter. Where the cause of action survives as herein provided, the executors or administrators may maintain an action at law thereon against the party, against whom the cause of action accrued, or after his death against his personal representatives.

Sec. 367. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person.

Sec. 368. In an action against several executors or administrators, they shall all be considered as one person representing their testator or intestate, and judgment may be given and execution issued against all of them who are defendants in the action, although the summons be served only on part of them, in the same manner and with like effect as if served on all, except as provided in the next section.

Sec. 369. When a judgment is given against an executor or administrator for want of answer, such judgment is not to be deemed evidence of assets in his hands, unless it appear, that the complaint alleged assets, and that the summons was served upon him.

Sec. 370. In an action against executors or administrators, in which the fact of their having administered the estate of their testator or intestate, or any part thereof, is put in issue, and the inventory of the property of the deceased returned by them, is given in evidence, the same may be contradicted or avoided by evidence:

1. That any property has been omitted in such inventory, or was not returned therein at its full value, or that since the return thereof such property has increased in value:

2. That such property has perished or been lost, without the fault of such executors or administrators; or that it has been fairly and duly sold by them, at a less price than the value so returned; or that, since the return of the inventory, such property has deteriorated in value. In such action the defendants cannot be charged for any things in action, specified in their inventory, unless it appear that they have been collected, or with due diligence might have been.

SEC. 372. No person is liable to an action as executor of his own wrong, for having taken, received, or interfered with the property of a deceased person; but is responsible to the executors or administrators of such deceased person, for the value of all property so taken or received, and for all injury caused by his interference, with the estate of the deceased.

SEC. 372. An executor of an executor, has no authority as such to commence or maintain an action or proceeding, relating to the estate of the testator of the first executor, or to take any charge or control thereof.

SEC. 373. An action may be commenced against an executor or administrator at any time after the expiration of six months from the granting of letters testamentary or of administration, and until the final settlement of the estate and discharge of such executor or administrator from the trust, and not otherwise.

SEC. 374. Such action shall not be commenced until the claim of the plaintiff has been duly presented to such executor or administrator, and by him disallowed. If such claim is presented after the expiration of such period of six months, the executor or administrator in an action therefor, shall only be liable to the extent of the assets in his hands at the time the summons is served upon him.

SEC. 375. In an action against an executor or administrator as such, the provisional remedies of arrest and attachment shall not be allowed, on account of the acts of his testator or intestate; but for his own acts as such executor or administrator, such remedies shall be allowed for the same causes, in like manner, and with like effect as in actions at law generally.

CHAPTER V.

General provisions.

SEC. 376. For what causes a suit in equity may be maintained.
377. Mode of proceeding in a suit.
378. Limitation of suits.
379. In whose name suit to be prosecuted.
380. Plaintiffs and defendants, who may be.
381. Same subject.
382. What sections of title III. of chapter I. shall apply to suits.
383. Where suits commenced and tried.
384. Change of place of trial.
385. What provisions of chapter I. shall apply to suits.
386. Service of the summons.
387. Service of the summons by publication.
388. What objections if not taken by demurrer or answer may be made on the trial.
389. Counter claim of defendant.
390. What causes of suit may be united
391. Arrest and bail in suits.

TITLE I.—*Of issues, their trial, and the mode thereof.*

TITLE II.—*Of the mode of enforcing a decree.*

TITLE III.—*Injunction.*

TITLE IV.—*Of the foreclosure of liens upon real or personal property.*

TITLE V.—*Suits for the partition of real property.*

TITLE VI.—*Suits by and against executors, administrators, legatees, heirs, or devisees.*

TITLE VII.—*Suits to declare void, or dissolve the marriage contract.*

TITLE VIII.—*Suits to determine adverse claims to real property, and to cancel a patent wrongfully issued therefor.*

SEC. 376. The enforcement or protection of a private right, or the prevention of, or redress for an injury thereto, shall be obtained by a suit in equity, in all cases where there is not a plain, adequate and complete remedy at law; and may be obtained thereby, in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this chapter. In a suit the party complaining shall be known as the plaintiff and the adverse party as the defendant.

SEC. 377. Bills of Revivor and bills of review of whatever nature, cross bills, exceptions for insufficiency, impertinence, or irrelevancy are abolished; but a decree in equity may be impeached and set aside, or suspended or avoided, or carried into execution, by an original suit.

The mode of proceeding in a suit from the commencement to the determination thereof, and thereafter until satisfaction or performance of the decree be had, shall be as provided in this chapter and not otherwise.

Sec. 378. A suit shall only be commenced within the time limited to commence an action as provided in title II. of chapter I. of this code. A suit for the determination of any right or claim to, or interest in real property, shall be deemed within the limitation provided for actions for the recovery of the possession of real property. In a suit upon a new promise, fraud or mistake, the limitation shall only be deemed to commence from the making of the new promise, or the discovery of the fraud or mistake.

Sec. 379. Every suit shall be prosecuted in the name of the real party in interest, except as in this section otherwise provided. An executor or an administrator, a trustee of an express trust, or a person expressly authorized to sue by statute, may sue without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another.

Sec. 380. All persons having an interest in the subject of the suit and in obtaining the relief demanded, may be joined as plaintiffs, except as in this chapter otherwise provided. Any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

Sec. 381. Of the parties to the suit, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff, cannot be obtained, he may be made a defendant the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Sec. 382. Sections 28, 30, 31, 32, 36, 37, 39, and 40, of title III. of chapter I., shall apply to suits in equity.

Sec. 383. Suits in equity in the following cases shall be commenced and tried in the country where the subject of the suit or some part thereof is situate:

1. For the partition of real property.
2. For the foreclosure of a lien upon real property.
3. For the determination of an adverse claim, estate, or interest in real property, or the specific performance of an agreement in relation thereto.

In all other cases, the suit shall be commenced and tried in the county in which the defendants or either of them reside, or may be found at the commencement of the suit, or if none of the defendants reside in this state, the same may be commenced and tried in any county in the state, which the plaintiff may designate in his complaint.

SEC. 384. The court may change the place of trial on the motion of either party to the suit, where it appears from the affidavit of such party; either,

1. That the suit has not been commenced in the proper county; or,
2. That the judge is a party to, or directly interested in the event of the suit; and,
3. That the motion is not made for the purpose of delay.

Such change may be taken at any time before answer and not otherwise, and in the manner, and with like effect as in an action.

SEC. 385. The provisions of chapter I from and inclusive of title V. of such chapter, to and inclusive of title XIII. thereof, shall apply to and govern the mode of proceeding in suits except as otherwise or specially provided in this chapter.

SEC. 386. When there is more than one defendant in the suit, service of the summons may be made by serving only one copy of the complaint on such of the defendants as the plaintiff may designate by a direction endorsed on such copy.

SEC. 387. In addition to the cases enumerated in the subdivisions of section 55, service of the summons may be made by publication in the following cases:

1. When the subject of the suit is real or personal property in this state, and the defendant has, or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein;
2. When the suit is for divorce, in the cases provided for in title VII. of this chapter.

SEC. 388. The objection to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of suit, if ot taken by demurrer or answer may be made on the trial.

Sec. 389. The counter claim of the defendant shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit; and in addition to the cases specified in the subdivisions of section 72, it is sufficient if it be connected with the subject of the suit. Sections 88, 89, 90, and 91, shall not apply to suits in equity.

Sec. 390. The plaintiff in a suit may unite several causes of suit in the same complaint, when they all arise out of:

1. The same transaction, or transactions connected with the same subject of suit.
2. Contract express or implied, or
3. Injuries with or without force to property.
4. Claims to real property, or any interest therein, with or without an account for the rents and profits thereof.
5. Claims to personal property or any interest therein, with or without an account for the use thereof.
6. Claims against a trustee by virtue of a contract, or by operation of law.

But the causes of suit so united, must all belong to one of these classes, and must affect all the parties to the suit, and not require different places of trial, and shall be separately stated.

Sec. 391. The writ of *ne exeat* is abolished, and instead thereof the plaintiff in a suit, may have the defendant arrested and held to bail in like manner and with like effect as provided in title XIII. of chapter I. of this code. A cause of arrest in a suit, shall be the same as those specified in section 106, so far as the same may exist, and not otherwise.

TITLE I.

Of issues, their trial, and the mode thereof.

Sec. 392. Title I. of chapter II. shall apply to suits. When jury may be formed.
393. How and when testimony taken.
394. Conduct of the trial.
395. Objections to depositions when and how made.
396. Same subject.
397. Titles VI. and X. of chapter II. shall apply to suits.
398. Decree of dismissal before trial, and effect thereof.
399. Same subject after trial.
400. Titles XII., XIII. and XIV. of chapter II. shall apply to suits.
401. When decree may be given in vacation. The entry, roll and final record thereof.

Sec. 392. The provisions of title I. of chapter II. of this code shall apply to suits, except as in this title otherwise or specially provided.

Both issues of law and fact shall be tried by the court, unless referred. Whenever it becomes necessary or proper to enquire of any fact by the verdict of a jury, the court may direct a statement thereof, and that a jury be formed to enquire of the same. The statement shall be tried as an issue of fact in an action, and the verdict may be read as evidence, on the trial of the suit.

SEC. 393. As soon as the pleadings are completed, and if the suit be at issue on a question of fact, the parties may take the depositions of witnesses to be offered in evidence on the trial. No deposition shall be taken after the expiration of three months from the filing of the last pleading, unless by order of the court or judge thereof, enlarging the time therefor, and such court or judge may by order prescribe a shorter time than three months for the taking of testimony. The testimony of a witness shall not be heard except by deposition, unless for special reasons by order of the court or judge thereof, naming the witness and made within the time allowed to take his deposition.

SEC. 394. When the suit is called for trial, the trial shall proceed in the order prescribed in subdivisions 1, 2, 3, 4 and 5, of section 194, unless the court for special reasons otherwise directs.

SEC. 395. Upon the trial either party may object to the reading of a deposition or any part thereof, when offered by the other, because the witness is incompetent, or the testimony is so, or irrelevant and not otherwise. All other objections to depositions, shall be taken by written exceptions filed with the clerk within ten days from the closing of the testimony and before the first day of the term next following thereto, and may be heard and decided by the court or judge thereof at any time thereafter, before the trial of the suit.

SEC. 396. When it appears from the deposition that a party was present at the examination of a witness, such party shall not be heard to object to anything in or concerning such deposition not excepted to at the time of taking the same, except the objections allowed to be taken on the trial as provided in section 393. When any part of the examination of a witness is excluded for any reason, so much of the cross examination as relates to the same matter is excluded also.

SEC. 397. The provisions of title VI. and X. of chapter II. of this code shall apply to suits, but the final determination of the rights of the parties thereto, is called a decree, and any intermediate determination is called an order.

SEC. 398. A decree dismissing a suit, may be given against the plaintiff in any of the cases specified in subdivisions 1, 2 and 3 of section 243, except the last clause of such subdivision 3. Such decree is a determination of the suit, but shall not have the effect to bar another suit for the same cause, or any part thereof.

SEC. 399. Whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed or any part thereof, a decree shall be given dismissing the suit, and such decree shall have the effect to bar another suit for the same cause or any part thereof, unless such determination be on account of a failure of proof on the part of the plaintiff, in which case, the court may on motion of such plaintiff, give such decree without prejudice to another suit by the plaintiff for the same cause or any part thereof.

SEC. 400. The provisions of title XII., also of title XIII. of chapter II. of this code, from and inclusive of section 247, to and inclusive of section 250, shall apply to suits. The provisions of title XIV. of such chapter, shall apply to controversies which might be the subject of a suit.

SEC. 401. When upon the submission of a suit, the court is unadvised as to what decree ought to be given therein, it may reserve the case for further consideration, and may decide the same and give such decree in vacation, by filing the same with the clerk. When a decree is given in a suit, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given. Sections 257, 258, 260, 261 and 265 of this code shall apply to suits. The provisions of title XVI. of chapter II. of this code shall apply to decrees and the final record or roll thereof.

TITLE II.

Of the mode of enforcing a decree.

SEC. 402. When decree requiring the performance of a particular act, equivalent thereto. When order or decree may be enforced by punishment of party.

403. Chapter III. shall apply to suits, so far as applicable.

SEC. 402. A decree requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified, shall, if such party do not comply therewith, be deemed and taken to be equivalent thereto. The court or judge thereof may enforce an order or decree in a suit, other than for the payment of money, by punishing the party refusing or neglecting to comply therewith, as for a contempt.

SEC. 403. The provisions of chapter III. of this code shall apply to the enforcement of decrees, so far as the nature of the decree may require or admit of it; but the mode of trial of an issue of fact in a proceeding against a garnishee shall be according to the mode of trial of such issue in a suit.

TITLE III.

Injunction.

SEC. 404. Definition of, and how permanent injunction enforced.
405. Allowance of injunction.
406. Service of the order allowing the injunction.
407. When defendant may be restrained during the pendency of the suit.
408. Allowance of injunction after answer.
409. Motion to vacate or modify injunction.

SEC. 404. An injunction is an order requiring a defendant in a suit to refrain from a particular act; it is only allowed as a provisional remedy, and when a decree is given enjoining a defendant, such decree shall be effectual and binding on such defendant without other proceeding or process, and may be enforced if necessary as provided in section 402.

SEC. 405. An injunction may be allowed by the court or judge thereof at any time after the commencement of the suit and before decree. Before allowing the same, the court or judge, shall require of the plaintiff an undertaking with one or more sureties, to the effect that he will pay all costs and disbursements that may be decreed to the defendant, and such damages, not exceeding an amount therein specified, as he may sustain by reason of the injunction, if the same be wrongful or without sufficient cause.

SEC. 406. The undertaking and affidavits, if any, upon which the injunction is allowed, shall be filed with the clerk. The order may be served as a summons, and returned to the clerk, with the proof of service endorsed thereon; except, that the service shall be made upon the defendant personally. The order may be filed with the clerk at once, and shall be deemed to be served upon the defendant from the date of its allowance, if it appear therefrom, that the defendant appeared before the court or judge at the allowance thereof.

SEC. 407. When it appears by the complaint that the defendant is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, concerning the subject of the suit, and tending to render the decree ineffectual; or when it appears by affidavit, that the defendant threatens, or is about to remove or dispose of his property or any part thereof with intent to delay or defraud his creditors; an injunction may be allowed to restrain such act, removal, or disposition.

SEC. 408. An injunction shall not be allowed after the defendant has answered, except upon notice, but in such case the defendant may be restrained until the decision of the court or judge allowing or refusing the injunction; and before answer, if the court or judge deem it proper that the defendant should be heard before allowing an injunction, an order may be made requiring the defendant to shew cause at a specified time and place why the injunction should not be allowed; and in the meantime the defendant may be restrained.

SEC. 409. If the injunction be allowed without notice, the defendant may, at any time after answer and before trial, apply, upon notice, to the court or judge thereof to vacate or modify the same. The application may be made upon affidavits in addition to the answer, and if so the plaintiff may oppose the same by affidavits or other evidence, in addition to those upon which the injunction was allowed. If upon the hearing of the motion it satisfactorily appears that the injunction should not have been allowed, either in whole or in part, it shall be vacated or modified accordingly.

TITLE IV.

Of the foreclosure of liens upon real or personal property.

SEC. 410. Liens upon real or personal property, how foreclosed. Decree in case personal obligation given for the debt.

411. In such suit, who must be made defendants, and who may be at the option of the plaintiff, or by the order of the court.

SEC. 412. Where two or more liens upon the same property, nature of decree.
413. How decree enforced.
414. Property sold upon a decree of foreclosure, how redeemed.
415. When proceeds of sale not claimed, to be put at interest.
416. Suit for foreclosure cannot be maintained, during pendency of action for the debt.
417. Nature of decree where debt payable in instalments, some of which not due.
418. If before sale defendant pay to the clerk amount of debt and costs proceedings to cease. Court to determine value of instalments not due. Provisions of this title not to affect other remedy in regard to personal property.

SEC. 410. A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise shall be foreclosed and the property adjudged to be sold to satisfy the debt secured thereby, by a suit. In such suit in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt, has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons as the case may be, as in the case of an ordinary decree for the recovery of money.

SEC. 411. Any person having a lien subsequent to the plaintiff upon the same property or any part thereof, or who has given a promissory note or other personal obligation for the payment of the debt or any part thereof, secured by the mortgage or other lien which is the subject of the suit, shall be made a defendant in the suit, and any person having a prior lien may be made defendant at the option of the plaintiff, or by the order of the court when deemed necessary.

SEC. 412. When it is adjudged that any of the defendants have a lien upon the property, the court shall make a like decree in relation thereto, and the debt secured thereby as if such defendant were a plaintiff in the suit; and when a decree is given foreclosing two or more liens upon the same property or any portion thereof in favor of different persons not united in interest. Such decree shall determine and specify the order of time, according to their priority, in which the debts secured by such liens shall be satisfied out of the proceeds of the sale of the property.

SEC. 413. The decree may be enforced by the execution as an ordinary decree for the recovery of money except as in this section otherwise or specially provided:

1. When a decree of foreclosure and sale is given, an execution

may issue thereon against the property adjudged to be sold. If the decree is in favor of the plaintiff only, the execution may issue as in ordinary cases, but if it be in favor of different persons, not united in interest, it shall issue upon the joint request of such persons, or upon the order of the court or judge thereof on the motion of either of them.

2. When the degree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree, as the sum remaining unsatisfied, the decree may be enforced by execution as in ordinary cases. When in such cases the decree is in favor of different persons not united in interest, it shall be deemed a separate decree as to such persons and may be enforced accordingly.

SEC. 414. A decree of foreclosure shall have the effect to bar the equity of redemption, and property sold on execution issued upon a decree may be redeemed in like manner and with like effect, as property sold on an execution issued on a judgment, and not otherwise.

SEC. 415. When any of the proceeds of the sale remains with the clerk unclaimed by the person who is entitled to the same for the period of two months, the court or judge thereof shall direct that the same be put at interest by the clerk, subject to the order of the court, for the benefit of such person, his representatives, or assigns.

SEC. 416. During the pendency of an action at law, for the recovery of a debt secured by any lien mentioned in section 410, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment, is returned unsatisfied in whole or in part.

SEC. 417. When a suit is commenced to foreclose a lien, by which any debt is secured, which debt is payable in instalments either of interest or principal, and any of such instalments is not then due, the court shall decree a foreclosure of the lien, and may also decree a sale of the property for the satisfaction of the whole of such debt, or so much thereof as may be necessary to satisfy the instalment then due with costs of suit; and in the latter case the decree of foreclosure as to the remainder of the property, may be enforced by an order of sale in whole or in part, whenever default shall be made in the payment of the instalments not then due.

SEC. 418. If before a decree is given the amount then due with the costs of suit is brought into court and paid to the clerk, the suit shall be dismissed, or if the same be done after decree and before sale, the effect of the decree as to the amount then due and paid, shall be terminated, and the execution if any have issued be recalled by the clerk. When an instalment not due is adjudged to be paid, the court shall determine and specify in the decree what sum shall be received in satisfaction thereof, which sum may be equal to such instalment or otherwise, according to the present value thereof. The provisions of this title, as to liens upon personal property, are not to be construed, so as to exclude a person having such lien, from any other remedy or right, in regard to such property.

TITLE V.

Suits for the partition of real property.

SEC. 419. Who may maintain a suit for partition.
420. Complaint, what it shall contain.
421. What lien creditors may be made defendants, and upon what share lien continues after partition.
422. Summons, how directed.
423. Upon whom summons may be served by publication.
424. Answer, what to contain.
425. Rights of the parties may be put in issue, and in case of sale, title first to be ascertained.
426. When order of sale may be made, instead of decree of partition.
427. How referees to make partition.
428. Court may set aside or confirm, report of referees; when confirmed, effect of.
429. Who not affected thereby.
430. Expenses of referees.
431. When order of sale may be made, upon report of referees.
432. In case of partial sale, how estate for life of years set-off.
433. Before making order of sale, lien creditors to be made parties.
434. When reference ordered to ascertain lien creditors by judgment or decree.
435. In case such liens exist court to appoint referee, to ascertain the amount due thereon.
436. Plaintiff to serve notice on such lien creditors to appear before referee, and make proof in relation thereto
437. Duties of such referee.
438. Report of such referee may be excepted to, notice to absent or unknown lien creditors.
439. Effect of confirmation of report of such referee.
440. Distribution of the proceeds of sale, how decreed.
441. When party to the suit may be required to exhaust other securities before distribution of proceeds of sale.
442. Proceedings to determine amount of liens, and rights of parties to funds paid into court, not to delay or affect certain parties.
443. Proceeds of sale to be distributed by referees if directed by the court, otherwise to be paid into court.
444. When suit to continue after payment of proceeds into court, and proceedings therein.
445. Sale by referees how made.
446. Court may direct sale to be made on credit

447. Mortgages and other securities, how taken by referees.
448. Estate for life or years how disposed of.
449. Compensation for such estate in case of sale.
450. If consent not given, court to determine the value of such estate.
451. Rule for the determination of the value of such estate.
452. Rights of unknown tenants for life or years, to be protected.
453. Inchoate or contingent interests, how provided for.
454. Terms of sale to be made known at the time of sale.
455. Referees, nor any person for them, not to purchase.
456. Report of sale by referees, what to contain.
457. Report may be excepted to. Effect of order of cofirmation.
458. When party entitled to a share, or an incumbrancer becomes purchaser, receipt may be taken for the amount.
459. When and what proceeds of sale to be invested.
460. In whose name securities taken or investment made.
461. Same subject.
462. When clerk to keep an account of securities and investments and receive interest thereon.
463. When equal partition cannot be made, court may decree compensation to be made.
464. When proceeds of sale paid to guardian of infant.
465. When paid to guardian of insane person.
466. When guardian may consent to partition.
467. Costs of partition how apportioned.

Sec. 419. When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, a suit may be maintained by one or more of such persons, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

Sec. 420. The interest of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint, specifically and particularly as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain, or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

Sec. 421. The plaintiff may at his option, make creditors having a lien upon the property or any portion thereof, other than by judgment or decree, defendants in the suit. When the lien is upon an undivided interest or estate of any of the parties, such lien, if a partition be made, is thenceforth a lien only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.

SEC. 422. The summons shall be directed by name to all the *tenants in common, who are known, and in the same manner to all* lien creditors who are made parties to the suit, and generally to all persons unknown, having or claiming an interest or estate in the property.

SEC. 423. If a party having a share or interest in, or lien upon the property be unknown, or either of the known parties reside out of the state or cannot be found therein, and such fact be made to appear by affidavit, the summons may be served on such absent or unknown party, by publication, directed by the court or judge as in ordinary cases. When service of the summons is made by publication, it must be accompanied by a brief description of the property, which is the subject of the suit.

SEC. 424. The defendant shall set forth in his answer the nature and extent of his interest in the property, and if he be a lien creditor, how such lien was created, the amount of the debt secured thereby, and remaining due, and whether such debt is secured in any other way, and if so the nature of such other security.

SEC. 425. The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined in such suit, and where a defendant fails to answer, or where a sale of the property is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the decree for partition or sale is given.

SEC. 426. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise upon the requisite proofs being made, it shall decree a partition according to *the respective rights of the parties as ascertained by the court,* and appoint three referees therefor, and shall designate the portion to remain undived, for the owners whose interests remain unknown or not ascertained.

SEC. 427. In making the partition, the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper land marks, and may employ a surveyor with the necessary assistants to aid them therein. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.

SEC. 428. The court may confirm or set aside the report in whole or in part, and if necessary appoint new referees. Upon the report being confirmed, a decree shall be given that such partition be effectual forever, which decree shall be binding and conclusive:

1. On all parties named therein, and their legal representatives who have at the time any interest in the property divided, or any part thereof as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property or any part thereof, after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, who may be unknown, to whom notice shall have been given of the application for partition by publication, as directed by section 423; and

3. On all other persons claiming from such parties or persons, or either of them.

SEC. 429. But such decree and partition shall not affect any tenants, for years or for life of the whole of the property which is the subject of partition; nor shall such decree and partition preclude any person, except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition shall have been made.

SEC. 430. The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as part of the charges.

SEC. 431. If the referees report to the court, that the property, of which partition shall have been decreed, or any seperate portion thereof, is so situated, that a partition thereof cannot be made, without great prejudice to the owners; and the court is satisfied that such report is correct, it may thereupon, by an order, direct the referees to sell the property or seperate portion thereof, so situated.

SEC. 432. When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the property, the whole of such estate may be set off in any part of the property not ordered to be sold.

SEC. 433. Before making an order of sale, if lien creditors, other than those by judgment or decree, have not been made parties, the court on motion of either party shall order the plaintiff to file a supplemental complaint, making such creditors parties defendant to the suit.

SEC. 434. If an order of sale be made, and before a distribution of the proceeds thereof, the plaintiff shall produce to the court the certificate of the clerk of the county where the property is situated, showing the liens remaining unsatisfied, if any, by judgment or decree upon the property or any portion thereof, and unless he do so, the court shall order a reference to ascertain them.

SEC. 435. If it appear by such certificate, or reference, in case the certificate is not produced, that any such liens exist, the court shall appoint a referee to ascertain what amount remains due thereon, or secured thereby respectively, and the order of priority in which they are entitled to be paid out of the property.

SEC. 436. The plaintiff must cause a notice to be served at least ten days before the time for appearance on each person having such lien by judgment or decree, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise, of the true amount due, or to become due contingently or absolutely on his judgment or decree.

SEC. 437. The referee shall receive the evidence, and report the names of the creditors whose liens are established, the amounts due thereon, or secured thereby, and their priority respectively, and whether contingent or absolute. He shall attach to his report the proof service of the notices and the evidence before him.

SEC. 438. The report of the referee may be excepted to, by either party to the suit, or to the proceedings before the referee in like manner and with like effect as in ordinary cases. If a lien creditor be absent from the state, or his residence therein be unknown, and that fact appear by affidavit, the court or judge thereof may by order direct that service of the notice may be made upon his agent or attorney of record, or by publication thereof, for such time and in such manner as the order may prescribe.

SEC. 439. If the report of the referee be confirmed, the order of confirmation is binding and conclusive upon all parties to the suit and upon the lien creditors who have been duly served with the notice to appear before the referee as provided in section 436.

SEC. 440. The proceeds of the sale of the incumbered property, shall be distributed by the decree of the court, as follows:

1. To pay its just proportion of the general costs of the suit;
2. To pay the costs of the reference;
3. To satisfy the several liens in their order of priority, by payment of the sums due, and to become due, according to the decree.
4. The residue among the owners of the property sold, according to their respective shares.

SEC. 441. Whenever any party to the suit who holds a lien upon the property or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

SEC. 442. The proceedings to ascertain the amount of the liens, and to determine their priority as above provided, or those hereinafter authorized to determine the rights of parties to funds paid into court, shall not delay the sale, nor affect any other party, whose rights are not involved in such proceedings.

SEC. 443. The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But if no such direction be given, all such proceeds and securities shall be paid into court, or deposited as directed by the court.

SEC. 444. When the proceeds of sales of any shares or parcel belonging to persons who are parties to the suit and who are known, are paid into court, the suit may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original suit.

SEC. 445. All sales of real property made by the referees shall be made by public auction to the highest bidder, in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property, or any part of it is to be sold, subject to a prior estate, charge or lien, that shall be stated in the notice.

SEC. 446. The court shall, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises, of which it may direct a sale on credit; and for that portion of which the purchase money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, parties out of the state.

SEC. 447. The referees may take separate mortgages, and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, in the name of the clerk of the court, and his successor in office; and for the shares of any known owner of full age, in the name of such owner.

SEC. 448. When the estate of any tenant for life or years, in any undivided part of the property in question, shall have been admitted by the parties, or ascertained by the court to be existing at the time of the order of sale, and the person entitled to such estate shall have been made a party to the suit, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if in the judgment of the court, a due regard to the interest of all the parties require that such estate be also sold, the sale may be so ordered.

SEC. 449. Any person entitled to an estate for life or years in any undivided part of the property, whose estate shall have been sold, shall be entitled to receive such sum in gross as may be deemed upon principles of law applicable to annuities, a reasonable satisfaction for such estate, and which the person so entitled shall consent to accept instead thereof, by an instrument duly acknowledged or proved in the same manner as deeds for the purpose of record, and filed with the clerk.

SEC. 450. If such consent be not given, as provided in the last section, before the report of sale the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate for life or years, and shall order the same to be deposited in court for that purpose.

SEC. 451. The proportion of the proceeds of the sale to be invested as provided in section 450, shall be ascertained and determined in the several cases as follows:

1. If an estate in dower be included in the order of sale, its proportion shall be one-third of the proceeds of the sale of the property, or of the sale of the undivided share in such property, upon which the claim of dower existed;

2. If an estate by the curtesy or other estate for life or years, be included in the order of sale, its proportion shall be the whole proceeds of the sale of the property, or of the sale of the undivided share thereof in which such estate may be.

And in all cases, the proportion of the expenses of the proceedings shall be deducted from the proceeds of the sale.

SEC. 452. If the persons entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights, in the same manner as far as may be, as if they were known and had appeared.

SEC. 453. In all cases of sales in partition, when it appears that a married woman has an inchoate right of dower in any of the property sold, or that any person has a vested or contingent future right, or estate therein the court shall ascertain and settle the proportional value of such inchoate, contingent or vested right or estate, according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner, as to protect the rights and interests of the parties.

SEC. 454. In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately, or otherwise if the court so directs.

SEC. 455. Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall the guardian of an infant party be interested in the purchase of any real property, being the subject of the suit except for the benefit of the infant. All sales contrary to the provisions of this section, shall be void.

SEC. 456. After completing the sale, the referees shall report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale; and the securities, if any taken. The report shall be filed with the clerk.

SEC. 457. The report of sale may be excepted to by any party entitled to a share of the proceeds, in like manner and with like effect as in ordinary cases. If the sale be confirmed the order of confirmation shall direct the referees to execute conveyances and take securities pursuant to such sale, which acts they are hereby authorized to do. Such order shall have the effect to discharge the property of the estate or interest of every person mentioned in section 428 and of tenants for life or years of the property sold, and shall be binding and conclusive upon all such persons, as if the same were a decree for the partition of such property, and upon all persons whomsoever as to the regularity of the proceedings concerning such sale, except as provided in section 455.

SEC. 458. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

SEC. 459. When there are proceeds of sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, or when there are proceeds arising from the sale of an estate, subject to the prior estate of a tenant for life or years, which are paid into court, or otherwise deposited by order of the court, the same shall be invested in securities on interest for the benefit of the persons entitled thereto.

SEC. 460. When the security for the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk [of the] court, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

SEC. 461. When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of, and payable to the parties respectively entitled thereto, and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk.

SEC. 462. The clerk, in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

SEC. 463. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another, on account of the inequality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

SEC. 464. When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale to his general guardian, or the special guardian, appointed for him in the suit, upon giving the security required by law, or directed by order of the court.

SEC. 465. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing with sufficient sureties, an undertaking, approved by the judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

SEC. 466. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in common, or in any other manner, so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without suit, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may respectively be entitled, upon an order of the court.

SEC. 467. The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case they shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When however a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

TITLE VI.

Suits by and against executors, administrators, legatees, heirs or devisees.

SEC. 468. Title VI. of chapter IV. shall apply to suits, what causes of suit survive to and against the personal representatives.
469. Suit against next of kin by creditor of the estate.
470. Each liable for the whole amount received.
471. Next of kin may maintain suit to compel contribution.
472. Suit against legatees by creditor of the testator.
473. Apportionment of costs in suit against next of kin or legatees.
474. Payment of the amount recovered against any one, satisfies the decree as to such person.
475. Heirs, or devisees liable for the debts of their ancestor or testator.
476. In what cases and to what extent not liable.
477. Section 476 not to affect a case, where debt charged upon real estate by will.
478. Preference of debts, and definition thereof.
479. How decree against heir or devisee enforced.
480 When heirs or devisees personally liable.
481. Decree against several heirs or devisees, jointly, to be apportioned among them.
482. Devisees not liable when there are assets.
483. Liable for deficiency only.
484. Sections 482 and 483, not to affect, a case where the debt is charged upon the real property by the will.

SEC. 468. The provisions of title VI. of chapter IV. of this code shall apply to suits by and against executors and administrators, except as in this title otherwise or specially provided. Sections 365, 366, and 367, of such title shall not so apply. All causes of suit, by one person against another however arising, survive to the personal representatives of the former and against the personal representatives of the latter. When the cause of suit survives as herein provided, the executors or administrators may maintain a suit in equity thereon, against the party, against whom the cause of suit accrued, or after his death against his personal representatives.

SEC. 469. The next of kin of a deceased person are liable to a suit in equity by a creditor of the estate to recover the distributive shares, received out of such estate, or to so much thereof as may be necessary to satisfy his debt. The suit may be against all of the next of kin jointly, or against any one or more of them severally.

SEC. 470. In such suit, the plaintiff may recover the value of all the assets received by all the defendants in the suit if necessary to satisfy his debt; and the amount of the recovery shall be apportioned among the defendants, in proportion to the value of the assets received by each; and no allowance or deduction shall be made from such amount, on account of there being other next of kin to whom assets have also been delivered.

SEC. 471. Any one of the next of kin, against whom a recovery is had pursuant to section 470, may maintain a suit against all the other next of kin of the deceased person, to whom any such assets have been delivered, jointly, or against any of them separately, for a just and equal contribution, and may recover of each defendant such an amount as shall be in the same proportion to the whole sum collected of the plaintiff, as the value of the assets delivered to such defendant bore to the value of all the assets delivered to all the next of kin of the deceased.

SEC. 472. Legatees are liable to a suit in equity by a creditor of the testator to recover the value of any legacy received by them. The suit may be maintained against all the legatees jointly, or against any one or more of them severally. In such suit the plaintiff shall not recover unless he shows:

1. That no assets were delivered by the executor or administrator of the testator, to his next of kin: or
2. That the value of such assets has been recovered by some other creditor:
3. That such assets are not sufficient to satisfy the demand of the plaintiff.

And in the last case he shall recover only the deficiency. The whole amount which the plaintiff shall recover, shall be apportioned among all the legatees of the testator, in proportion to the value of their legacies respectively, and his proportion shall only be recovered of each legatee.

SEC. 473. In a suit against several next of kin or legatees jointly, for assets delivered to them, if a recovery be had against such next of kin or legatees, the cost of such suit shall be apportioned among the several defendants, in proportion to the amount recoved against each of them.

SEC. 474. A decree against several next of kin or legatees, shall be satisfied as to any one of them, by the payment or satisfaction of the amount recovered against such defendant.

SEC. 475. Heirs and devisees are liable to a suit by a creditor of a deceased person, to recover the debt of their ancestor or testator to the extent of the value of any real property inherited by, or devised to, them. If such suit be against the heirs, all the heirs who are liable shall be made parties to the suit.

SEC. 476. But the heirs are not liable for the debt, unless it appear that the personal assets of the deceased were insufficient to discharge it, or that after due proceedings the creditor has been unable to collect the debt from the personal representatives of the deceased, or from his next of kin or legatees. If the personal assets were sufficient to pay a part of the debt, or in case a part thereof shall have been collected, the heirs of such deceased person are liable for the residue.

SEC. 477. Section 476 shall not affect the liability of heirs for a debt of their ancestor, where such debt was, by his will expressly charged exclusively on the real property descended to such heirs, or where such debt is by the will expressly directed to be paid out of the real property descended before resorting to the personal property.

SEC. 478. In cases where the next of kin, legatees, heirs, and devisees, are liable for the debts of their ancestors, as herein provided, they shall be liable therefor without other priority or preference than such ansestors would be. The word debt as used in this title shall be construed to include all claims for the payment of money whether liquidated or otherwise, which survive against the personal representatives of the deceased as provided in section 468.

SEC. 479. A decree against an heir or devisee on account of the debt of his ancestor or testator, may be enforced by execution against the real property shown to have descended to the heir or devisee, and not otherwise. Such decree shall have preference as a lien on such real property to any judgment or decree obtained against such heir or devisee on account of a debt or demand due in his own right.

Sec. 480. When it appears in the suit, that before the commencement thereof, the heir or devisee has aliened the real property descended to him, or any part thereof, he shall be personally liable for the value of the property so aliened, and a decree may be given against him therefor, to be enforced by execution, as if the decree were for his own debt. No real property aliened in good faith and for a valuable consideration by an heir or devisee before suit commenced against him, is liable to an execution for the debt of his ancestor or testator, or in any manner affected by a decree therefor against such heir, or devisee.

Sec. 481. In a suit against several heirs jointly, or several devisees jointly, the amount which the plaintiff recovers, must be apportioned among all the heirs of the ancestor, or devisees of the testator, in proportion to the value of the real property descended or devised, and such proportion only can be recovered of each heir or devisee.

Sec. 482. A devisee shall not be liable to the creditor of his testator, unless it appear that the personal assets of the testator, and the real property descended to his heirs were insufficient to discharge the debt, or unless it appear that after due proceedings the creditor has been unable to recover the debt or any part thereof from the personal representatives of the testator, or from his next of kin, legatees, or heirs.

Sec. 483. In either of the cases specified in section 482, the amount of the deficiency of the personal assets, and of the real property descended, to satisfy the debt of the plaintiff, or the amount which such plaintiff may have failed to recover from the personal representatives of the testator, his next of kin, legatees and heirs, may be recovered of the devisees of such testator, to the extent of the value of the real property devised to them respectively.

Sec. 484. Sections 482 and 483 shall not affect the liability of devisees, for a debt of their testator, where such debt was by his will expressly charged exclusively upon the real property devised, or by the terms of the will made payable by the devisee, or out of the real property devised, before resorting to the personal property or to any other real property descended or devised.

TITLE VII.

Suits for the dissolution of the marriage contract.

SEC. 485. Husband and wife may maintain suit to dissolve marriage contract or declare the same void.
486. What marriages absolutely void.
487. What marriages void from the time they are so declared.
488. When marriage may be declared void from the beginning, at the suit of either party, effect of confirmation thereof.
489. At whose suit marriage may be declared void for the causes specified in section 487.
490. Suit to declare marriage valid.
491. For what causes and at whose suit, marriage may be declared dissolved.
492. In a suit to declare marriage void, plaintiff must be an inhabitant of the State, and when defendant also.
493. When suit can be maintained to dissolve the marriage contract.
494. When the defendant may admit the charge of the plaintiff, and plead in bar of the suit.
495. When marriage declared void or dissolved, effect of upon the real property of either party.
496. What the court may order during the pendency of the suit and before decree therein.
497. When a marriage declared void or dissolved, what the court may further decree.
498. Power of the court to modify the decree after it is given and in what particulars.
499. When marriage declared void or dissolved, it terminates the marriage as to both parties, but neither can contract marriage until the period for appeal has expired.

SEC. 485. A husband or wife may maintain a suit against the other for dissolution of the marriage contract, or to have the same declared void, as provided in this title.

SEC. 486. All marriages which are prohibited by law, on account of consanguinity between the parties, or on account of either of them having a former husband or wife then living or on account of either of them being of one fourth or more of negro blood, shall if solemnized within this state be absolutely void.

SEC. 487. When either of the parties to a marriage shall be incapable of making such contract or assenting thereto, for want of legal age, or sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage shall be void, from the time it is so declared by the decree of a court having jurisdiction thereof.

SEC. 488. A marriage may be declared void from the beginning at the suit of either party, for any of the causes specified in section 486, and whether so declared or not, shall be deemed and held to be void in any action, suit or proceeding whatever in which the same may come in question; but a marriage once declared to be valid by the decree of a court having jurisdiction thereof in a suit for that purpose, cannot afterwards be questioned for the same cause directly or otherwise.

Sec. 489. A marriage shall not be declared void for any of the causes specified in section 487, except at the suit or claim of the party laboring under the disability, or upon whom the force or fraud was imposed or practiced; nor at the suit or claim of such party, if it appears that the parties freely cohabited together as husband and wife after the party had arrived at legal age, acquired sufficient understanding, been restored to reason, freed from the force, or discovered the fraud, as the case may be.

Sec. 490. When either husband or wife shall claim or pretend that the marriage is void or voidable as provided in sections 486 and 487, the same may be declared valid and lawful at the suit of the other; and in such suit the court shall have power, if the pleadings and proofs authorize it, to declare such marriage void from the beginning, or from the time of the decree or that it is valid and lawful and binding on the parties thereto.

Sec. 491. A dissolution of the marriage contract may be declared at the suit or the claim of the injured party for either of the following causes:

1. Impotency, existing at the time of the marriage, and continuing to the commencement of the suit.
2. Adultery.
3. Conviction of a felony.
4. Habitual gross drunkenness, contracted since marriage, and continuing for two years prior to the commencement of the suit.
5. Wilful desertion for the period of three years.
6. Cruel and inhuman treatment, or personal indignities rendering life burdensome.

Sec. 492. When a marriage has been solemnized in this state, a suit may be maintained to declare it void, if the plaintiff is an inhabitant of the state at the commencement of the suit. If the marriage has not been solemnized in this state such suit can only be maintained when both the parties are inhabitants thereof at the commencement of the suit, and the plaintiff for one year prior thereto.

Sec. 493. A suit for the dissolution of the marriage contract, can only be maintained, when the plaintiff is an inhabitant of this state at the commencement of the suit, and has been for one year prior thereto, and when, either the marriage contract was solemnized in this state; or the defendant is also an inhabitant thereof, and the cause of suit arose in this state, or during a removal thereto, and subsequently to the parties being domiciled in any other state, territory or country.

SEC. 494. In a suit for the dissolution of the marriage contract on account of adultery, the defendant may admit the adultery and show in bar of the suit: either,

1. That the act was committed by the procurement, or with the connivance of the plaintiff; or,

2. That the act has been expressly forgiven, or impliedly so, by the voluntary cohabitation of the parties after knowledge thereof; or,

3. That the plaintiff has been guilty of adultery also, without the procurement or connivance of the defendant, and not forgiven as provided in subdivision 2 of this section; or

4. That the suit has not been commenced within one year after the discovery of the act by the plaintiff.

When the suit is for any of the causes specified in subdivisions 3, 4, 5 or 6 of section 491, the defendant may admit the charge and show in bar of the suit, that the act complained of was committed by the procurement of the defendant, [plaintiff?] or that it has been expressly forgiven, or that the suit has not been commenced within one year after the right of suit accrued.

SEC. 495. Whenever a marriage shall be declared void or dissolved, the real property of the husband or wife shall be discharged from any claim of the other to any estate therein, or right to the possession or profits thereof, except as in this section specially provided: If the marriage is declared dissolved on account of the adultery, or conviction of a felony of either party, the adverse party shall be entitled as tenant in dower, or by the curtesy as the case may be, in the real property of the other, the same as if the party convicted of felony or committing the adultery were dead.

SEC. 496. After the commencement of a suit and before a decree therein, the court or judge thereof may in its discretion, provide by order as follows:

1. That the husband pay or secure to be paid to the clerk of the court, such an amount of money as may be necessary to enable the wife to prosecute or defend the suit as the case may be.

2. For the care, custody, and maintainance of the minor children of the marriage during the pendency of the suit.

3. For the freedom of the wife from the control of the husband during the pendency of the suit.

SEC. 497. Whenever a marriage shall be declared void or dissolved, the court shall have power to further decree as follows:

1. For the future care and custody of the minor children of the marriage, as it may deem just and proper, having due regard to the age and sex of such children, and unless otherwise manifestly improper, giving the preference to the party not in fault.

2. For the recovery off the party in fault, and not allowed the care and custody of such children, such an amount of money, in gross or in instalments, as may be just and proper for such party to contribute towards the nurture and education thereof.

3. For the recovery off the party in fault, such an amount of money, in gross or in instalments, as may be just and proper for such party to contribute to the maintainance of the other.

4. For the delivery to the wife, when she is not the party in fault, of her personal property in the possession or control of the husband at the time of giving the decree.

5. For the appointment of one or more trustees, to collect, receive, expend, manage or invest, in such manner as the court shall direct, any sum of money decreed for the maintainance of the wife, or the nurture and education of minor children committed to her care and custody.

6. To change the name of the wife when she is not the party in fault.

SEC. 498. At any time after a decree is given, the court or judge thereof, upon the motion of either party, shall have power to set aside alter or modify so much of the decree as may provide for the appointment of trustees, for the care and custody of the minor children, or the nurture and education thereof, or the maintainance of either party to the suit.

SEC. 499. A decree declaring a marriage void or dissolved at the suit or claim of either party shall have the effect to terminate such marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and if he or she does so contract, shall be liable therefor as if such decree had not been given;

until the suit has been heard and determined on appeal, or if no appeal be taken, the expiration of the period allowed by this code to take such appeal.

TITLE VIII.

Suits to determine adverse claims to real property, and to cancel a patent wrongfully issued therefor.

SEC. 500. Suit to determine adverse claim by party in possession.

501. Suit to cancel patent wrongfully issued.

SEC. 500. Any person in possession, by himself or his tenant, of real property, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest.

SEC. 501. Whenever any person claims real property as a donee of the United States, by virtue of a settlement thereon under the act of Congress approved September 27, A. D., 1850, commonly called the donation law, or the acts amendatory thereof, and the patent for such property or any portion thereof shall have been wrongfully issued to another; such person may maintain a suit in equity against the person to whom the patent may issue or those claiming under him, for the purpose of having such patent canceled, and the estate or interest of the plaintiff in the property ascertained and established. In such suit the party entitled to, and making the settlement under such acts of Congress, and complying with the subsequent conditions thereby required, shall be taken and deemed to have a legal estate in fee in the property, although the patent therefor has issued to another.

CHAPTER VI.

General provisions.

SEC. 502. This chapter to apply to both actions and suits.
503. If original paper or pleading be lost, copy may be filed.
504. When successive actions or suits may be maintained upon the same contract or transaction.
505. When actions or suits may be consolidated. When deemed pending.
506. When court has jurisdiction of natural person.
507. When court has jurisdiction of corporation.
508. What jurisdiction court may exercise when it has jurisdiction of the parties.
509. When majority of referees or other persons may act.
510. Computation of time for the publication of legal notices or other acts.

SEC. 502. The provisions of this chapter shall apply to the proceedings in both actions and suits, except as herein otherwise or specially provided.

SEC. 503. If an original paper or pleading be lost or withheld by any person, the court or judge thereof may order a copy thereof to be filed and used instead of the original.

SEC. 504. Successive actions or suits may be maintained upon the same contract or transaction, whenever after the former action or suit, a new cause of action or suit arises therefrom.

SEC. 505. Whenever two or more actions or suits are pending at one time, between the same parties, and in the same court, upon causes which might have been joined, the court may upon the motion of the defendant order the same to be consolidated. An action or suit is deemed to be pending from the commencement thereof, until its final determination upon appeal, or until the expiration of the period allowed to take an appeal.

SEC. 506. No natural person is subject to the jurisdiction of a court of this state, unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached. But this section is not to be construed to limit the power of the courts of this state to declare a marriage void or a dissolution thereof, when the defendant is a non-resident of the state, in the cases provided for in title VII. of chapter V.

SEC. 507. No corporation is subject to the jurisdiction of a court of this state, unless it appear in the court, or have been created by, or under the laws of this state, or have an agency established therein for the transaction of some portion of its business, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached.

SEC. 508. When the court has jurisdiction of the parties, it may exercise it, in respect to any cause of action or suit, wherever arising, except for the specific recovery of real property situated without this state, or for an injury thereto.

SEC. 509. Whenever there is more than one referee, all must meet, but a majority of them may do any act which might be done by all, and whenever any authority is conferred on three or more persons it may be exercised by a majority of them, upon the meeting of all unless expressly otherwise provided.

SEC. 510. The time within which an act is to be done, as provided in this code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other non-judicial day, in which case the last day shall also be excluded. The time for the publication of legal notices, shall be computed so as to exclude the first day of publication, and to include the day on which the act or event of which notice is given, is to happen, or which completes the full period required for publication.

TITLE I.—*Offer to compromise and the inspection of writings.*
TITLE II.—*Motions and orders.*
TITLE III.—*Notices, and service and filing of papers.*
TITLE IV.—*Appeals.*
TITLE V.—*Costs and disbursements.*
TITLE VI.—*Records and files of the court.*

TITLE I.

Offer to compromise and the inspection of writings.

SEC. 511. Offer to compromise, how accepted, and effect thereof.

512. Order for the inspection or copy of books or papers, and effect of refusal or neglect to obey the same.

SEC. 511. The defendant may at any time before trial serve upon the plaintiff an offer to allow judgment or decree to be given against him for the sum, or the property, or to the effect, therein specified. If the plaintiff accept the offer, he shall by himself or attorney endorse such acceptance thereon, and file the same with the clerk, before trial and within three days from the time it was served upon him; and thereupon judgment or decree shall be given accordingly as in case of a confession. If the offer be not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff fail to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him, costs and disbursements from the time of the service of the offer.

Sec. 512. The court or judge thereof, while an action or suit is pending may order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession, or under his control, containing evidence or matters relating to the merits of the action or suit, or the defence therein. If obedience to the order be neglected or refused, the court may exclude the book, document or paper from being given in evidence, or if wanted as evidence by the party applying therefor, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party so neglecting or refusing as for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, documents or papers, when he is examined as a witness.

TITLE II.

Motions and orders.

Sec. 513. Order and motion, definition of.
514. Motions, to whom, and where made.
515. Notice of motion, time of, and when necessary.

Sec. 513. Every direction of a court or judge made or entered in writing and not included in a judgment or decree, is denominated an order. An application for an order is a motion.

Sec. 514. Motions shall be made to the court or judge as provided in other parts of this code. They shall be made within the circuit where the action or suit is triable, except when made to a judge of the court before whom the action is pending and without notice, in which case, an order may be made by such judge in any part of the state.

SEC. 515. When a notice of a motion is necessary, it shall be served ten days before the time appointed for the hearing; but the court or judge thereof may prescribe by order endorsed upon the notice a shorter time. Notice of a motion is not necessary except when this code requires it, or when directed by the court or judge in pursuance thereof.

TITLE III.

Notices, and service and filing of papers.

SEC. 516. Notices to be in writing.
517. Notices and other papers how served, and upon whom.
518. When service may be made by mail, time allowed for distance.
519. How copy deposited, and when service deemed to be made.
520. Appearance how made. Defendant not to be heard before appearance except to give undertakings.
521. When party absent from the state how service made. If there be an attorney service must be made upon him and not the party.
522. Foregoing provisions not to apply to the service of a summons.
523. Notice is valid, though defective in form.
524. All papers to be filed, how filed, and when clerk may decline to file them.

SEC. 516. Notices shall be in writing, and notices and other papers shall be served on the party or attorney in the manner prescribed in this title, where not otherwise provided by this code.

SEC. 517. The service, or deposit in the post office when served by mail, may be made by any person other than the party himself. The proof of service shall be the same as the proof of service of a summons, and shall be returned with the original notice or other paper of which service is made at the time and place therein prescribed for the hearing or other proceeding to be had thereon. The service may be personal, by delivery of a copy of the notice or other paper to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney it may be made during his absence from his office by leaving the copy with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office, or if it be not open to

admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the copy at his residence, between the hours of six in the morning and nine in the evening with some person of suitable age and discretion.

Sec. 518. Service by mail may be made, when the person for whom the service is made, and the person on whom it is to be made, reside in different places between which there is a communication by mail, adding one day to the time of service for every fifty miles of distance between the place of deposit and the place of the address.

Sec. 519. In case of service by mail, the copy must be deposited in the post office addressed to the person on whom it is to be served, at his place of residence and the postage paid. The service shall be deemed to be made on the first day after the deposit in the post office, that the mail leaves the place of deposit for the place of the address, and not otherwise.

Sec. 520. A defendant appears in an action or suit, when he answers demurs, or gives the plaintiff written notice of his appearance, and until he does so appear, he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property. When the defendant has not appeared, notice of a motion or other proceeding need not be served upon him, unless he be imprisoned for want of bail, or unless directed by the court or judge thereof in pursuance of this code.

Sec. 521. When a party is absent from the state, and has no attorney in the action or suit, service may be made by mail if his residence be known, if not known on the clerk for him. But when a party has an attorney in the action or suit, service of notice or other papers, shall be made upon the attorney if he reside in the county where the action or suit is pending, instead of the party and not otherwise.

Sec. 522. The foregoing provisions do not apply to the service of a summons or other process, nor so much thereof as allows service to be made of any notice or other paper to bring a party into contempt, otherwise than upon such party personally.

Sec. 523. A notice or other paper is valid and effectual, although defective, either in respect to the title of the action or suit in which it is made, or the name of the court or the parties, if it intelligibly refer to such action or suit.

SEC. 524. All undertakings, affidavits or other papers required by or provided for in this code shall be filed with the clerk, except when this code otherwise specially provides. A pleading or paper shall be filed by delivering the same to the clerk at his office, who shall endorse upon it the day of the month and the year and subscribe his name thereto. The clerk shall not be required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney, if there be one, is intelligibly endorsed on the back of it, nor unless the contents thereof can be read by a person of ordinary skill.

TITLE IV.

Appeals.

SEC. 525. How judgment or decree reviewed, and when order to be deemed a judgment or decree.
526. Who may appeal, and how parties known.
527. How appeal is taken and perfected.
528. Undertaking for the appeal, and further one for stay of proceedings.
529. Notwithstanding stay of proceedings, perishable property may be sold. When court may dispense with further undertaking. When proceedings stayed upon undertaking for appeal only.
530. When respondent may enforce judgment or decree, notwithstanding stay of proceeding.
531. Transcript when filed, what to contain, if not filed appeal deemed abandoned.
532. Rule upon clerk to further certify as to omissions in the transcript.
533. Judgment only to be reviewed upon questions of law, but on appeal from decree suit to be tried anew.
534. Power of appellate court to affirm, modify or reverse, and if necessary order a new trial.
535. Intermediate order may be reviewed, and when restitution directed.
536. How decision of the appellate court given and enforced.
537. When damages given for delay, and the amount thereof.

SEC. 525. A judgment or decree may be reviewed as prescribed in this title and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right and made in a proceeding after judgment or decree, for the purpose of being reviewed shall be deemed a judgment or decree.

SEC. 526. Any party to a judgment or decree, other than a judgment or decree given by confession or for want of answer, may appeal therefrom. The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action or suit is not changed in consequence of the appeal.

SEC. 527. An appeal shall be taken and perfected in the manner prescribed in this section, and not otherwise.

1. The appellant shall cause a notice to be served on the adverse party and file the original, with proof of service endorsed thereon, with the clerk where the judgment or decree is entered. Such notice shall state that the appellant appeals from the judgment or decree or some specified part thereof, and shall contain the certificate of an attorney of the court to the effect, that he has examined the judgment or decree and that the same is substantially erroneous and in what particulars.

2. Within ten days from the service of notice of the appeal the appellant shall file with the clerk an undertaking as hereinafter provided. Within five days thereafter the adverse party shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto.

3. The qualifications of sureties in an undertaking on an appeal, shall be the same as in bail on arrest, and if excepted to, they shall justify in like manner.

4. From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof, if excepted to, the appeal shall be deemed perfected. When a party in good faith gives due notice of an appeal from a judgment or decree, and thereafter omits through mistake to do any other act necessary to perfect the appeal, or to stay proceedings, the court or judge thereof may permit an amendment, or performance of such act, on such terms as may be just.

5. An appeal to the supreme court shall be taken by serving and filing the notice of appeal, within one year from the entry of the judgment or decree appealed from or to the circuit court within six months after such entry, and not otherwise.

SEC. 528. The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following:

1. If the judgment or decree appealed from be for the recovery

of money, or of personal property, or the value thereof; that if the same or any part thereof be affirmed, the appellant will satisfy it so far as affirmed.

2. If the judgment or decree appealed from be for the recovery of the possession of real property, for a partition thereof, or the foreclosure of a lien thereon; that during the possession of such property by the appellant he will not commit, or suffer to be committed any waste thereon, and that if such judgment or decree or any part thereof be affirmed, the appellant will pay the value of the use and occupation of such property so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding a sum therein specified, to be ascertained and fixed by the court or judge thereof.

3. If the decree appealed from require the transfer or delivery of any personal property, unless the things required to be transferred or delivered, be brought into court or placed in the custody of such officer or receiver as the court may appoint; that the appellant will obey the decree of the appellate court. The amount of such undertaking shall be specified therein, and be fixed by the court or judge thereof.

4. When the decree appealed from is for the foreclosure of a lien, and also against the person for the amount of the debt secured thereby, the undertaking shall also be to the effect that the appellant will pay any portion of such decree, remaining unsatisfied after the sale of the property, upon which the lien is foreclosed.

When the decree appealed from requires the execution of a conveyance or other instrument, execution of the decree is not stayed by the appeal, unless the instrument is executed and deposited with the clerk, within the time allowed to file the undertaking, to abide the decree of the appellate court.

SEC. 529. When the proceedings are stayed, if perishable property has been seized to satisfy or secure the judgment or decree, or has been directed to be sold thereby, the court or judge thereof may order the property to be sold, as if the proceedings were not stayed, and the proceeds thereof to be deposited or invested to abide the decision of the appellate court. The court or judge thereof in its discretion may dispense with or limit the further undertaking required by subdivisions 1, 2, 3 and 4 of section 528, when the appellant is an executor, administrator, trustee, or other person acting in another's right. In cases not provided for in such subdivisions, when an appeal is perfected, with an undertaking for the appeal only, proceedings shall be stayed as if the further undertaking therefor had been given.

Sec. 530. If the judgment or decree has been given in an action or suit upon a contract, notwithstanding an appeal, and undertaking for the stay of proceedings, the respondent may proceed to enforce such judgment or decree, if within ten days from the time the appeal is perfected, he file with the clerk an undertaking with one or more sureties, to the effect, that if the judgment or decree be reversed or modified, the respondent will make such restitution as the appellate court may direct. Such undertaking may be excepted to by the appellant in like manner and with like effect as the undertaking of an appellant, and the sureties therein shall have the same qualifications.

Sec. 531. Upon the appeal being perfected, the appellant shall within twenty days thereafter if the appeal be to the supreme court, or if to the circuit court within ten days thereafter, file with the clerk of the appellate court the transcript of the cause, as provided in this section and thereafter the appellate court has jurisdiction of the cause, and not otherwise.

1. The transcript is a copy, certified by the clerk, of the roll or final record, or the pleadings, orders, papers and journal entries that constitute such roll or record, together with a copy of the notice of appeal and any order enlarging the time to file the transcript, and a statement of the filing of the undertaking, whether by the appellant or respondent, the names of the sureties therein, the amount thereof if the same is specified, and if given by the appellant whether the undertaking is given for an appeal only, or a stay of proceedings also.

2. If the appeal is from a decree, the clerk shall attach together the depositions and other papers on file in his office, containing the evidence heard or offered on the trial in the court below, and append thereto his certificate to that effect, and deliver them to the appellant with the transcript, taking therefor his receipt in duplicate, one of which he shall file in his office and deliver the other to the respondent when so requested. For the purpose of acquiring jurisdiction by the appellate court, such evidence shall be deemed a part of the transcript, and shall be filed therewith.

3. If the transcript is not filed with the clerk of the appellate court within the time provided, the appeal is to be deemed abandoned and the effect thereof terminates, but the court or judge thereof, may upon notice to the respondent and such terms as may be just, by order

enlarge the time for filing the same, but such order shall be made within the time allowed to file the transcript, and shall not extend it beyond the term of the appellate court next following the appeal.

4. If the appeal be abandoned as provided in subdivision 3 of this section, thereafter the judgment or decree so far as it is for the recovery of money may be enforced against the sureties in the undertaking for a stay of proceedings as if they were parties to such judgment or decree.

SEC. 532. When it appears by affidavit to the satisfaction of the court, that the transcript is incomplete in any particular substantially affecting the merits of the judgment or decree appealed from, on motion of the respondent the court shall make a rule upon the clerk of the court below, requiring him to certify as to such alleged omission, and if true, to transmit to the appellate court a certified copy of the pleading, entry, order or other paper, omitted in the transcript; or, in such case the respondent may move to dismiss the appeal, and the court shall allow such motion, unless, on the cross motion of the appellant it makes a rule upon the clerk concerning such omission as provided in this section upon such terms as may be just. At any time before the hearing or trial, the court, on motion of the appellant, may dismiss the appeal; and thereupon the court shall affirm the judgment or decree appealed from as a matter of course.

SEC. 533. Upon an appeal from a judgment, the same shall only be reviewed as to questions of law appearing upon the transcript, and shall only be reversed or modified for errors substantially affecting the rights of the appellant; but, upon an appeal from a decree the suit shall be tried anew upon the transcript and evidence accompanying it.

SEC. 534. Upon an appeal the appellate court may affirm, reverse, or modify the judgment or decree appealed from, in the respect mentioned in the notice, and not otherwise; as to any or all of the parties joining in the appeal, and may include in such decision any or all of the parties not joining in the appeal, except a co-defendant of the appellant, against whom a several judgment or decree might have been given in the court below; and may if necessary and proper order a new trial.

SEC. 535. Upon an appeal the appellate court may review any intermediate order involving the merits, or necessarily affecting the judgment or decree appealed from; and when it reverses or modifies such judgment or decree may direct complete restitution of all property and rights lost thereby.

SEC. 536. The decision of the appellate court shall be given and enforced as provided in this section.

1. Upon an appeal to the supreme court its decision shall be entered in the journal, and the cause remitted by mandate to the court below for further proceedings as therein directed. If a new trial be ordered, upon the receipt of the mandate by the clerk of the court below, the decision and order shall be entered in the journal, and thereafter the cause shall be deemed pending and for trial in such court, according to the directions of the appellate court.

2. If a new trial is not ordered, upon the receipt of the mandate by such clerk, a judgment or decree shall be entered in the journal and docketed in pursuance of the direction of the appellate court, in like manner and with like effect as if the same was given in the court below.

3. Upon an appeal to the circuit court, its decision shall be given, entered, docketed and enforced in like manner and with like effect as if the cause had been commenced in that court; unless a new trial is ordered, in which case, the order may be in the discretion of the court, either, that the cause be remitted to the court below, or that the new trial be had in the circuit court.

4. If judgment or decree be given against the appellant, it shall be entered against his sureties also, in like manner and with like effect, according to the nature and extent of their undertaking. An appeal shall not discharge the lien of a judgment or decree, and unless the same be reversed, the lien thereof shall be merged and continue in the affirmed or modified judgment or decree given on appeal, from the time of the entry and docketing of the same in the court below.

SEC. 537. Whenever a judgment or decree is affirmed on appeal, and the same be for the recovery of money or personal property or the value thereof, the judgment or decree shall be given for ten per cent. on the amount thereof for damages for the delay, unless it appear evident to the appellate court, that there was probable cause for taking the appeal.

TITLE V.

Costs and disbursements.

SEC. 538. Costs, definition of.
539. When costs allowed to plaintiff.
540. Costs, when several actions are brought on same cause of action.
541. Costs, when allowed to defendant.
542. Amount of costs.
543. Disbursements what constitute, and when allowed.
544. Cost and disbursements in a suit.
545. Who liable for fees of officers, what disbursements collected on execution.
546. Clerk to tax costs and disbursements, verified statement thereof to be filed. May be excepted to by adverse party.
547. When objections made clerk to decide, appeal therefrom to court.
548. Effect of such appeal.
549. Fees of referees.
550. Costs on postponement, or granting other application on terms.
551. Plea of tender, and effect of as to costs.
552. Guardian of infant plaintiff liable as plaintiff for costs
553. Costs where person sues or defends in the right of another
554. On review of decision of a court of inferior jurisdiction.
555. Costs, where state or public corporation therein a party, or where natural person joined as plaintiff, or the action is upon the information of such person.
556 Security for costs when plaintiff non-resident, or foreign corporation.
557. Same subject.
558. Costs on motion, and in cases not otherwise provided for.

SEC. 538. The measure and mode of compensation of attorneys shall be left to the agreement express or implied of the parties; but there may be allowed to the prevailing party in the judgment or decree, certain sums by way of indemnity for his attorney fees in maintaining the action or suit or defence thereto, which allowances are termed costs.

SEC. 539. Costs are allowed of course to the plaintiff upon a judgment in his favor in the following cases:

1. In an action for the recovery of the possession of real property, or where a claim of title or interest in real property, or right to the possession thereof arises upon the pleadings, or is certified by the court to have come in question upon the trial.

2. In actions for fines and forfeitures, and the actions provided for in titles IV. and V. of chapter IV. of this code.

3. In an action involving an open mutual account, where it appears to the satisfaction of the court that the sum total of such accounts of both parties, exceeds one hundred and fifty dollars.

4. In an action for the recovery of personal property.

5. In any action not hereinbefore specified for the recovery of money or damages, when the plaintiff shall recover fifty dollars or more.

But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction, or breach of promise of marriage; if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs and disbursements than damages; and in an action to recover the possession of personal property, if the plaintiff recover property or the value thereof, as established on the trial, and damages for the detention of the same, in all less than fifty dollars, he shall recover no more costs and disbursements, than the sum of such value and damages.

SEC. 540. When several actions shall be prosecuted for the same cause of action against several parties who might have been joined as defendants in the same action, disbursements shall be allowed the plaintiff in each action if he prevail therein, but costs shall not be allowed such plaintiff in more than one of such actions which shall be at his election; unless the party or parties prosecuted in such other action or actions shall at the time of the commencement of the previous action have been without this state or secreted therein.

SEC. 541. Costs are allowed of course to the defendant in the actions mentioned in section 539 unless the plaintiff be entitled to costs therein; and when there are several defendants not united in interest and making separate defences by separate answers, costs shall be allowed or not to each of such defendants as if the action were commenced against him separately.

SEC. 542. Costs when allowed to either party are as follows:

1. In the supreme court, on an appeal, to the prevailing party fifteen dollars.
2. In the circuit court, to the prevailing party, when judgment is given without trial of an issue of law or fact, or upon an appeal five dollars; when judgment is given after trial of an issue of law or fact ten dollars.
3. In the county court one half the amount allowed in the circuit court.

But when on an appeal to the supreme or circuit court a new trial is ordered, or a decision given modifying the judgment appealed from, the costs on appeal shall be allowed or not, in the discretion of the appellate court.

SEC. 543. A party entitled to costs, shall also be allowed for all necessary disbursements, including the fees of officers and witnesses, the necessary expenses of taking depositions by commission or otherwise, the expense of the publication of the summons or notices, and the postage where the same are served by mail, the compensation of referees and the necessary expense of copying any public record, book or document used as evidence on the trial.

SEC. 544. In a suit costs and disbursements shall be allowed to a party in whose favor a decree is given, in like manner and amount as an action, without reference to the amount recovered, or the value of the subject of the suit, unless the court otherwise directs.

SEC. 545. Every officer, witness or other person, required to do or perform any act or service, for any party to any action, suit or proceeding whatever, shall be entitled to demand and receive from such party the compensation which the law allows therefor in advance; and if he omit to do so, the compensation for such act or service is a debt due from such party, to such officer, witness or person, and cannot be collected by execution upon the judgment or decree, given in the action, suit, or proceeding, in which such act or service was done or performed. The costs and disbursements which a party is entitled to recover, after being allowed as hereinafter provided, may be collected by execution as a part of the judgment or decree, and none other.

SEC. 546. Costs and disbursements shall be taxed and allowed by the clerk. No disbursements shall be allowed any party, unless he shall within three days from the entry of judgment or decree, file with the clerk, and serve a copy thereof upon the adverse party or his attorney, a verified statement of the same in detail. The statement of disbursements, thus filed, and costs shall be allowed of course unless the adverse party within two days from the time allowed to file the same, shall file his objections thereto, stating the particulars of such objections.

SEC. 547. When objections are made to the claim for costs and disbursements, the clerk shall forthwith pass upon the same, and endorse upon the verified statement or append thereto, the charges allowed or disallowed. Any party aggrieved by the decision of the clerk in the allowance of costs or disbursements, may appeal from such decision to the court within five days from the date of such decision, by serving a notice of such appeal, and in what particulars upon the adverse party or his attorney, which appeal shall be heard and determined by such court or judge thereof as soon thereafter as convenient.

SEC. 548. Such appeal shall stay the proceedings as to the costs and disbursements to which the appeal is taken or relates, unless the respondent file with the clerk an undertaking, with one or more sureties, to the effect, that if the decision of the clerk be reversed or modified, he will make such restitution as the court or judge may direct. The sufficiency of the sureties in the undertaking may be excepted to by the appellant, and they be required to justify in like manner and with like effect as in an ordinary undertaking for an appeal.

SEC. 549. The fees of referees shall be four dollars per day, to each, for every day spent in the business of the reference, but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

SEC. 550. Upon an application to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars as costs may be imposed by the court as a condition of granting the postponement and in all cases where this code authorizes a court or judge to allow a party to do any act in an action, suit or proceeding upon terms, such court or judge may as a condition of such allowance, impose upon such party the payment of a like sum as costs.

SEC. 551. When in any action or suit for the recovery of money or damages only, the defendant shall allege in his answer that before the commencement thereof, be tendered to the plaintiff a certain amount of money in full payment or satisfaction of the cause of action or suit, and now brings the same into court and deposits it with the clerk for the plaintiff; if such allegation of tender be found true, and the plaintiff do not recover a greater sum than the amount so tendered, he shall not recover costs off the defendant, but the defendant shall recover them off him.

SEC. 552. When costs or disbursements are adjudged against an infant plaintiff, the guardian by whom he appeared in the action or suit, shall be responsible therefor, as if he were the actual plaintiff in such action or suit, and payment thereof may be enforced against him accordingly.

SEC. 553. In an action or suit prosecuted or defended by an executor, administrator, trustee of an express trust, or a per[son?] expressly authorized by statute to prosecute or defend therein, costs shall be recovered as in ordinary cases, but such costs shall only be chargeable upon, or collected off, the estate, fund, or party represented, unless the court or judge thereof shall order the same to be recovered off the plaintiff or defendant personally for mismanagement or bad faith in such action or suit, or the defence thereto.

SEC. 554. When the decision of any officer, tribunal, or court of inferior jurisdiction, is brought before a court for review, such review, shall for all the purposes of costs or disbursements be deemed an appeal to such court upon errors in law, and costs therein shall be allowed and recovered accordingly.

SEC. 555. In all actions or suits prosecuted or defended in the name and for the use of the state, or any county or other public corporation therein, the state, or public corporation shall be liable for and may recover costs, in like manner and with like effect as in the case of natural persons. When a natural person is joined with the state as plaintiff, or the action is upon the information of such natural person, he shall be liable in the first instance for the defendant's costs; and such costs shall not be recovered from the state, until after execution issued therefor against such person and returned unsatisfied in whole or in part.

SEC. 556. The attorney of a plaintiff who resides out of the state, or is a foreign corporation, against whom costs are adjudged in favor of a defendant, is liable to such defendant therefor; and if he neglect to pay the same, upon the information of such defendant shall be punished as for a contempt. The attorney may relieve or discharge himself from such liability, by filing an undertaking, at the commencement of the action or suit or at any time thereafter before judgment or decree, for the payment to the defendant of the costs and disbursements that may be adjudged to him, executed by one or more sufficient sureties.

SEC. 557. The sureties in such undertaking shall possess the qualifications of sureties in an undertaking for bail on arrest, and their sufficiency may be excepted by the defendant at any time within five days from notice of filing the same, and if so, they shall justify in an amount not less than two hundred dollars in like manner and with like effect as such sureties for bail on arrest. Until the time for excepting to the sufficiency of the sureties has expired, or if excepted to, until they be found sufficient the attorney is liable as if no undertaking had been given. A deposit of two hundred dollars or other sum, which the court or judge may direct, with the clerk, may be made in lieu of such undertaking.

SEC. 558. A sum not exceeding five dollars as costs, may be allowed to the prevailing party on a motion, in the discretion of the court, and may be absolute, or directed to abide the event of the action or suit. In any action suit or proceeding, as to which the allowance and recovery of costs may not be provided for in this title, or elsewhere in this code; costs may be allowed or not, according to the measure herein prescribed, and apportioned among the parties in the discretion of the court.

TITLE VI.

Records and files of court.

Sec. 559. Records of court, what constitute.
560. Register; how kept.
561. Journal, what to be entered therein.
562. Judgment docket, how arranged.
563. Execution docket, how kept.
564. Fee-book, what to be entered therein.
565. Final record, what to be recorded therein.
566. Jury-book, how kept.
567. Files of the court, what are.
568. Custody of the records and files, and when they may be taken out of the clerk's office.
569. Search and examination of records and files.

Sec. 559. The records of the circuit and county courts are a Register, Journal, Judgment docket, Execution docket, Fee-book, Jury-book and Final record. And the records of the supreme court are the Register, Journal and Fee-book only; but this section does not include the books and records of the county court, pertaining to probate and county business.

Sec. 560. The register is a book wherein the clerk shall enter by its title every action suit or proceeding, commenced in, or transferred or appealed to, the court whereof he is clerk, according to the date of its commencement transfer or appeal; and thereafter until the entry of judgment, note therein according to the date thereof, the filing or return of any paper or process, or the making of any order, rule, or other direction, in or concerning such action, suit, or proceeding.

Sec. 561. The journal is a book wherein the clerk shall enter the proceedings of the court during term time, and such proceedings in vacation as this code specially directs.

Sec. 562. The judgment docket, is a book wherein judgments and decrees are docketed as elsewhere provided in this code. Each page thereof shall be divided into eight columns and headed as follows: Judgment Debtors; Judgment Creditors; Amount of Judgment;

Date of entry in Journal; When Docketed; Appeal when taken; Decision on Appeal; Satisfaction when entered.

SEC. 563. The execution docket, is a book wherein the clerk shall note under the title of every cause the issue and return of execution, and generally the filing or return of any paper or process, or the making of any order, rule, or other direction therein, from and after the entry of judgment or decree, until satisfaction or performance thereof.

SEC. 564. The fee-book, is one wherein the clerk shall enter under the title of every cause, against the party to whom the service is rendered, the clerk's fees earned and received or not received, and none other, except as specially directed by this code.

SEC. 565. The final record, is a book wherein the clerk shall record the papers pleadings and proceedings in a cause as elsewhere provided in this code.

SEC. 566. The jury-book, is one wherein the clerk shall enter the names of the persons attending upon the court at a particular term as grand or trial jurors, the time of the attendance of each, and when discharged or excused, and the amount of fees and mileage earned by each.

SEC. 567. The files of the court are all papers or process filed with or by the clerk of the court, in any action, suit, or proceeding therein, or before the judge thereof.

SEC. 568. The records and files of the court are to be kept in the clerk's office in the custody of the clerk, and he is responsible for them. They shall not be taken out of the office by any one, except by the judge of the court or an attorney thereof, when allowed by special order of the court or judge, or some general rule therefor prescribed by the court and entered in the journal.

SEC. 569. Whenever requested the clerk shall furnish to any person a certified copy of any portion of such records or files, and no person other than such clerk is entitled to make such copy or to the use of the records or files for such purpose. Whenever requested the clerk shall search such records and files and give a certificate thereof according to the nature of the inquiry, and no other person other than such clerk, or an attorney of the court, shall be entitled to search and examine such records or files unless he be a party in interest as appears of record, concerning the matter sought to be examined or inquired of.

CHAPTER VII.

Preliminary provisions.

Sec. 570. Parties to special proceeding, how known.
571. In judgment, order and motion in, definition of.

Sec. 570. The party prosecuting a special proceeding shall be known as the plaintiff, and the adverse party as the defendant.

Sec. 571. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definition of a motion and an order in an action are applicable to similar acts in a special proceeding.

TITLE I.—*The writ of review.*
TITLE II.—*The writ of mandamus.*
TITLE III.—*The writ of habeas corpus.*
TITLE IV.—*The punishment of contempts.*

TITLE I.

The writ of review.

Sec. 572. Writ of *certiorari*, to be known as writ of review
573. Who may prosecute writ of review.
574. By whom allowed, and how applied for.
575 When allowed.
576 Undertaking of plaintiff, when notice to adverse party.
577. To whom the writ directed, and return thereto. Stay of proceedings
578. Stay of proceedings, when writ made returnable, and may be tried in vacation.
579 When and by whom writ issued. How served and proof thereof
580 Incomplete return. Limitation of writ
581. Power of court of review, its judgment may be appealed from.

Sec. 572. The writ heretofore known as the writ of *certiorari*, is known in this code as the writ of review.

Sec. 573. Any party to any process or proceeding before or by any inferior court, officer or tribunal, may have the decision or determination thereof reviewed for errors therein as in this title prescribed, and not otherwise. Upon a review, the court may review any intermediate order, involving the merits and necessarily affecting the decision or determination sought to be reviewed.

SEC. 574. The writ shall be allowed by the circuit court or judge thereof, of the county wherein the decision or determination sought to be reviewed was made, upon the petition of the plaintiff, describing the same with convenient certainty, and setting forth the errors alleged to have been committed therein. Such petition shall be signed by the plaintiff or his attorney, and verified by the certificate of an attorney of the court, to the effect that he has examined the process or proceeding, and the decision or determination therein, and that the same is erroneous as alleged in said petition.

SEC. 575. The writ shall be allowed in all cases, where there is no appeal, or other plain, speedy and adequate remedy, and where the inferior court officer or tribunal in the exercise of judicial functions, appears to have exercised such functions erroneously, or to have exceeded it or his jurisdiction, to the injury of some substantial right of the plaintiff, and not otherwise.

SEC. 576. Before allowing the writ, the court or judge shall require the plaintiff, to give an undertaking to its approval with one or more sureties in the sum of one hundred dollars, to the effect that he will pay all costs and disbursements that may be adjudged to the defendant on the review. Such court or judge may allow such undertaking to be given in a sum not less than fifty dollars, when it is probable that such sum will be sufficient, and may also require notice of the application for the writ to be given to the adverse party, or may allow the same without notice.

SEC. 577. The writ shall be directed to the court, officer or tribunal whose decision or determination is sought to be reviewed, or to the clerk or other person having the custody of its records or proceedings, requiring it or him, to return said writ to the circuit court from whence the same issued, within a time therein specified, with a certified copy of the record or proceedings in question annexed thereto, that the same may be reviewed by such circuit court, and requiring the defendant to desist from further proceedings in the matter to be reviewed.

SEC. 578. The words in the writ requiring a stay of proceedings may be inserted or omitted in the discretion of the court or judge, and the proceedings shall be stayed or not accordingly. The writ may be made returnable at the next term of the circuit court, or in vacation, and if the latter, the same may be tried and judgment given therein, by the judge thereof, in like manner and with like effect as in term time.

SEC. 579. Upon the filing of the order allowing the writ and the petition and undertaking of the plaintiff, the clerk shall issue the writ according the direction of the order. The writ shall be served by delivering the original according to the direction thereof, and may be served by any officer or person authorized to serve a summons. The proof of service shall be the certificate or affidavit as in case of the service of a summons, of the officer or person making the service, filed with the clerk.

SEC. 580. If the return to the writ be incomplete, the court may order a further return to be made. In no case shall the writ be allowed unless the application therefor be made within six months from the date of the decision or determination complained of.

SEC. 581. Upon the review the court shall have power to affirm, modify, reverse or annul the decision or determination reviewed, and if necessary to award restitution to the plaintiff, or by mandate direct the inferior court, officer or tribunal, to proceed in the matter reviewed according to its decision. From the judgment of the circuit court on review, an appeal may be taken to the supreme court in like manner and with like effect, as from a judgment of such circuit court in an action.

TITLE II.

The writ of mandamus.

SEC. 582. Mandamus to be known as in this title.
583. To whom writ may issue, not to control judicial discretion.
584. How writ applied for and [to] whom allowed and issued.
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586. Writ either alternative or peremptory, what to contain.
587. When peremptory writ shall be issued in first instance.
588. When defendant may shew cause, and how.
589. If defendant fail to shew cause, peremptory mandamus to issue.
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593. When court may impose fine upon defendant.
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595. How tried in the circuit and supreme court.
596. Appeal may be taken from judgment of circuit court.

SEC. 582. The writ of mandamus is known in this code as prescribed and regulated in this title, and not otherwise.

SEC. 583. It may be issued to any inferior court, corporation, board, officer, or person to compel the performance of an act, which the law specially enjoins, as a duty resulting, from an office, trust or station. But though the writ may require such court, corporation, board officer or person to exercise its or his judgment, or proceed to the discharge of any of its or his functions, it shall not control judicial discretion. The writ shall not be issued in any case, where there is a plain, speedy, and adequate remedy in the ordinary course of the law.

SEC. 584. The writ shall be allowed, by the court or judge thereof upon the petition, verified as a complaint in an action, of the party beneficially interested. It may be allowed with or without notice to the adverse party as in the case of a writ of review. Upon the filing of the petition and order of allowance, the writ shall be issued by the clerk in accordance therewith.

SEC. 585. The writ shall be directed to the court, corporation, board officer or person mentioned or designated in the order of allowance, and may be served thereon, by any officer or person authorized to serve a summons, by delivery of the original to such officer or person, or to any member of such court, or to any officer of such corporation upon whom this code authorizes a summons to be served. The proof of service shall be the same as in a writ of review, and obedience to the writ may be enforced in such manner as the court or judge thereof shall direct.

SEC. 586. The writ is either alternative or peremptory: when in the alternative, it shall state concisely the facts, according to the petition, showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed, or shew cause before the court or judge thereof by whom the writ was allowed, at a time and place therein specified, why he has not done so; and that he then and there return the writ, with his certificate annexed of having done as he is commanded, or the cause of his omission thereof. When peremptory the writ shall be in a similar form, except that, the words requiring the defendant to shew cause why he has not done as commanded, and to return the cause therefor, shall be omitted.

SEC. 587. When the right to require the performance of the act is clear, and it is apparent, that no valid excuse can be given for not performing it, a peremptory mandamus shall be allowed in the first instance; in all other cases, the alternative writ shall be first issued.

SEC. 588. On the return day of the alternative writ, or such further day as the court or judge thereof may allow, the defendant on whom the writ shall have been served, may show cause by demurrer or answer to the writ, in the same manner as to a complaint in an action.

SEC. 589. If the defendant do not shew cause by demurrer or answer, a peremptory mandamus shall be allowed against him. If the answer contain new matter the same may be demurred or replied to by the plaintiff within such time as the court or judge may prescribe. If the replication contain new matter, the same may be demurred to by the defendant within such time as the court or judge may prescribe, or he may countervail such matter on the trial or other proceedings by proof, either in direct denial or by way of avoidance.

SEC. 590. The pleadings in the proceeding by mandamus are those mentioned in sections 588 and 589, and none other are allowed. They are to have the same effect, and to be construed and may be amended, in the same manner as pleadings in an action. Either party may move to strike out, or be allowed to plead over, after motion or demurrer allowed or disallowed, and the issues joined shall be tried and the further proceedings thereon had in like manner and with like effect as in an action.

SEC. 591. If judgment be given for the plaintiff he shall recover the damages which he shall have sustained by reason of the premises, to be ascertained in the same manner as in an action, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay.

SEC. 592. A recovery of damages by virtue of this title against a party who shall have made a return to a writ of mandamus, is a bar to any other action or suit against the same party, for the same cause.

SEC. 593. Whenever a peremptory mandamus is directed to a public officer or body commanding the performance of any public duty, specially enjoined by law, if it appear to the court or judge thereof that such officer, or any member of such body, has without just excuse, refused or neglected to perform the duty so enjoined, the court or judge may impose a fine not exceeding five hundred dollars upon every such officer or member of such body; and the payment thereof is a bar to any action for any penalty incurred by such officer or member, by reason of his refusal or neglect to perform the duty so enjoined.

SEC. 594. The circuit court or judge thereof of the county wherein the defendant, if a public officer or body, exercises his or its functions, or if a private person or corporation, wherein such person resides or may be found, or such private corporation might be sued in an action, shall have exclusive jurisdiction of the proceeding herein prescribed, except that, the supreme court shall have jurisdiction of such proceeding in all cases arising in the state where it may be necessary or proper to enable such court to maintain its appellate jurisdiction.

SEC. 595. In the circuit court the writ may be made returnable, either in term time or vacation, and if the latter, may be tried and determined before the judge thereof in like manner and with like effect as in term time. In the supreme court, the writ may be allowed by the court or any judge thereof, but shall only be tried and determined by the court; and all issues of either fact or law therein, shall be tried by the court.

SEC. 596. From the judgment of the circuit court or judge thereof refusing to allow a mandamus, or directing a peremptory mandamus, an appeal may be taken to the supreme court in like manner and with like effect as in an action.

TITLE III.

The writ of habeas corpus.

SEC. 597. Definition of, and who may prosecute it.
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631. Writ, by whom served. Tender of fees, and undertaking.
632--633. Writ, how served.
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635. When charges for producing party, may be ordered paid.
636. Proof of service of writ.
637. Within what time return to be made.
638. What court has jurisdiction of the proceeding by habeas corpus.
639. Appeal from judgment in habeas corpus. Question once determined on habeas corpus not to be re examined.

SEC. 597. The writ of habeas corpus *ad subjiciendum* is the writ herein designated; and every other writ of habeas corpus is abolished. Every person imprisoned or otherwise restrained of his liberty, within this state, under any pretence whatsoever, except in the cases specified in the next section, may prosecute a writ of habeas corpus according to the provisions of this title, to inquire into the cause of such imprisonment or restraint; and if illegal to be delivered therefrom.

SEC. 598. The following persons shall not be allowed to prosecute the writ:

1. Persons imprisoned or restrained by virtue of process issued by a court of the United States, or a judge, or commissioner or other officer thereof, in cases where such courts, or judges or officers thereof have exclusive jurisdiction under the laws of the United States; or have acquired exclusive jurisdiction by the commencement of actions, suits or other proceedings in such courts, or before such commissioner or other officer thereof.

2. Persons imprisoned or restrained by virtue of the judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment, or decree.

SEC. 599. The writ shall be allowed by the court or judge thereof upon the petition of the party for whose relief it is intended, or by some other person in his behalf, signed and verified by the oath of the petitioner, to the effect that he believes it to be true.

SEC. 600. The petition shall state in substance:

1. That the party in whose behalf the writ is applied for, is imprisoned, or restrained of his liberty, the place where and officer or person by whom he is imprisoned or restrained, naming both parties if their names be known, or describing them, if not known.

2. That such person is not imprisoned or restrained, by virtue of any order judgment, decree, or process specified in section 598.

3. The cause or pretence of such imprisonment or restraint, according to the best knowledge or belief of the petitioner.

4. If the imprisonment or restraint be in virtue of any order warrant, or process, a copy thereof shall be annexed to the petition, or it must be alleged, that by reason of the removal or concealment of the party before the application, a demand of such copy could not be made, or that such demand was made, and the legal fees therefor tendered to the person having the party in his custody, and that a copy was refused.

5. If the imprisonment or restraint be alleged to be illegal, in what the alleged illegality consists.

6. That the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus. to the knowledge or belief of the petitioner.

Sec. 601. The court or judge, to whom the petition is presented must allow the writ without delay, unless it appears from the petition itself or from the documents annexed thereto, that the person for whose relief it is intended, is by the provisions of this title, prohibited from prosecuting the writ. Upon the filing of the petition and the order of allowance with the clerk, the clerk shall issue the writ immediately in accordance therewith.

Sec. 602. The writ shall command the defendant to produce the person imprisoned or restrained, by whatsoever name he may be called or charged, and certify and return therewith the time and cause of his imprisonment or restraint, before the court or judge allowing the writ at a time and place therein specified, or immediately after the receipt of the writ, to do and receive what shall then and there be considered concerning the person so imprisoned or restrained; or when it appears by the petition and documents thereto annexed, that the cause, or offence for which the person is imprisoned or restrained is not bailable, the production of the party may be dispensed with though such production be prayed for in the petition, and the writ issued accordingly.

Sec. 603. The writ shall not be disobeyed for any defect of form. It is sufficient:

1. If the officer or person having the custody of the party imprisoned or restrained, be designated either by his name of office, if he have any, or by his own name, or if both such names be unknown or uncertain, he may be described by an assumed appellation; and any one who may be served with the writ, is to be deemed the officer or person to whom it was directed, although it may be directed to him by a wrong name or description, or to another person:

2. If the person who is directed to be produced, be designated by name, or if his name be uncertain or unknown, he may [be] described in any other way, so as to designate the person intended.

Sec. 604. The officer or person upon whom the writ shall have been duly served, shall state in his return, plainly and unequivocally:

1. Whether he have or have not the party in his custody or power or under his restraint, and if he have not, whether he has had the party in his custody, or under his power or restraint at any, and what time prior or subsequent to the date of the writ;

2. If he have the party in his custody or power, or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large;

3. If the party be detained by virtue of any writ, warrant or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced, and exhibited on the return of the writ, to the court or judge, before whom the same is returnable;

4. If the person upon whom such writ shall have been served, shall have had the party in his power or custody, or under his restraint at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority such transfer took place. The return shall be signed by the person making the same, and except where such person shall be a sworn public officer, and shall make his return in his official capacity, it shall be verified by oath.

Sec. 605. The person or officer on whom the habeas corpus shall have been served, shall also bring the body of the person in his custody, according to the command of such writ, except in the case of the sickness of such person, as hereinafter provided.

Sec. 606. If the person upon whom such writ shall have been duly served, shall refuse or neglect to obey the same by producing the party named in such writ, and making a full and explicit return thereto within the time required, and no sufficient excuse be shown therefor, it shall be the duty of the court or judge before whom such writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue a warrant against such person, directed to the sheriff of any county in this state, and commanding him forthwith to apprehend such person and bring him immediately before such court or judge; and on such person being so brought, he shall be committed to close custody in the jail of the county in which such judge shall be, until he shall make return to such writ, and comply with any order that may be made in relation to the person for whose relief such writ shall have been issued.

SEC. 607. If a sheriff of any county shall have neglected to return such writ, the warrant may be directed to any coroner or other person to be designated therein, who shall have full power to execute the same, and such sheriff upon being brought up, may be committed to the jail of any county other than his own.

SEC. 608. The court or judge, by whom any such warrant shall be issued, may also, at the same time, or afterwards, issue a precept to the sheriff or other person to whom such warrant shall have been directed, commanding him to bring forthwith, before such court or judge, the party for whose benefit such writ shall have been allowed, who shall thereafter remain in the custody of such sheriff or person, until discharged or remanded.

SEC. 609. The court or judge, before whom the party shall be brought on such writ, shall immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the imprisonment or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not.

SEC. 610. If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, the court or judge shall discharge such party from the custody or restraint under which he is held.

SEC. 611. It shall be the duty of the court or judge forthwith to remand such party, if it shall appear that he is legally detained in custody, either:

1. By virtue of process issued by any court or judge or commissioner or other officer thereof of the United States, in a case where

such judge or court or officer thereof have conclusive jurisdiction; or

2. By virtue of the judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or

3. For any contempt, specially and plainly charged in the commitment, by some court, officer or body having authority to commit for the contempt so charged; and

4. That the time during which such party may be legally detained has not expired.

Sec. 612. If it appear on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer, in the course of judicial proceedings before him, authorized by law, such prisoner shall only be discharged in one of the following cases:

1. When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person;

2. When, though the original imprisonment was lawful, yet by some act, omission or event which has taken place afterwards, the party has become entitled to be discharged;

3. When the order or process is defective in some matter of substance required by law, rendering such process void;

4. When the order or process, though in proper form, has been issued in a case not allowed by law;

5. When the person having the custody of the prisoner under such order or process, is not the person empowered by law to detain him; or

6. When the order or process is not authorized by any judgment or decree of any court, nor by any provision of law.

Sec. 613. But no court or judge, on the return of a writ of habeas corpus, has power to inquire into the legality or justice of any order judgment or process specified in section 598, nor into the justice, propriety or legality of any commitment for a contempt made by a court officer or a body, according to law, and charged in such commitment, as provided in this code.

Sec. 614. If it appear that the party has been legally committed for a criminal offence, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be probably guilty of such offence, although the commitment be irregular, he shall forthwith be remanded to the custody, or placed under the restraint from which he was taken, if the officer or person under whose custody or restraint he was, be legally entitled thereto: if not so entitled, he shall be committed to the custody of the officer or person so entitled.

SEC. 615. Until judgment be given upon the return, the party may be either committed to the custody of the sheriff of the county or placed in such care, or under such custody as his age and other circumstances may require.

SEC. 616. When it appears from the return to the writ, that the party named therein is in custody on an order, or process under which an other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge, until it shall appear that the party so interested, or his attorney, shall have had notice of the time and place at which such writ shall have been made returnable.

SEC. 617. When it appears from the return, that the party is imprisoned or restrained on a criminal accusation, the court or judge shall make no order for his discharge until notice of the return is given to the district attorney of the county, where the party is imprisoned or restrained.

SEC. 618. The plaintiff in the proceeding on the return of the writ may, by replication, verified as in an action, controvert any of the material facts set forth in the return, or he may allege therein any fact, to show, either that his imprisonment or restraint is unlawful, or that he is entitled to his discharge; and, thereupon, the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint, or against the same, and to dispose of the party, as the law and justice of the case may require.

SEC. 619. The plaintiff may demur to the return, or the defendant may demur to the new matter, if any, set forth in the replication of the plaintiff, or by proof controvert the same, as upon a direct denial or avoidance. The pleadings herein provided for shall be made within such time as the court or judge shall direct, and they shall be construed and have the same effect as in an action.

SEC. 620. Whenever from the sickness or infirmity of the party, he cannot, without danger, be produced, the officer or person in whose custody he is, may state that fact in his return to the writ, and if satisfied of the truth of the allegation, and the return be otherwise sufficient, the court or judge shall proceed to decide on the return, and to dispose of the matter in the same manner as if the party had been produced.

Sec. 621. If it appear that the party detained is illegally imprisoned or restrained, judgment shall be given that he be forthwith discharged; otherwise judgment shall be given that the proceeding be dismissed and the party remanded.

Sec. 622. Notwithstanding the issuing of the writ without requiring the production of the person, the court or judge before whom the same was returnable, may, before final decision, issue a precept to the officer or other person to whom the writ was directed, requiring the production of the person.

Sec. 623. Obedience to a judgment, for the discharge of a person imprisoned or restrained, pursuant to the provisions of this title may be enforced by the court or judge, by proceedings for a contempt. No officer or other person is liable to any action or proceeding, for obeying such judgment of discharge.

Sec. 624. No person who has been finally discharged, upon a proceeding by habeas corpus, pursuant to the provisions of this title, shall be again imprisoned, restrained or kept in custody for the same cause; but it is not to be deemed the same cause:

1. If he have been discharged from a commitment on a criminal charge, and be afterwards committed for the same offence, by the legal order or process of the court, wherein he is bound, by recognizance or undertaking to appear, or in which he is indicted or convicted for the same offence; or

2. If, after a judgment of discharge for a defect of evidence, or for a material defect in the commitment, in a criminal case, the party be again arrested, on sufficient evidence, and committed by legal process, for the same offence; or,

3. If, in a civil action or suit the party have been discharged for any illegality in the judgment, decree or process herein before specified, and be afterwards imprisoned for the same cause of action or suit; or,

5. If, in a civil action or suit, he have been discharged from commitment on a writ of arrest, and be afterwards committed on execution, in the same action or suit, or on a writ of arrest in another action or suit, after the dismissal of the first one.

Sec. 625. Whenever it appears by satisfactory evidence that any person is illegally imprisoned or restrained and that there is good reason to believe that he will be carried out of the state or suffer some irreparable injury before he can be relieved by the issuing of a habeas corpus, any court or judge authorized to issue such writ, may issue a warrant reciting the facts, and directed to any sheriff, or other person, therein designated, commanding such officer or person to take such person, and forthwith to bring him before such court or judge, to be dealt with according to law.

SEC. 626. When the proof mentioned in the last section, shall also be sufficient to justify an arrest of the person having the party in his custody, as for a criminal offence, committed in the taking or detaining of such party, the warrant may also contain an order for the arrest of such person for such offence.

SEC. 627. Any officer or person to whom such warrant shall be directed, shall execute the same by bringing the party therein named, and the person who detains him, if so commanded by the warrant, before the court or judge issuing the same; and thereupon the person detaining such party shall make a return in like manner, and the like proceedings shall be had thereon as if a writ of habeas corpus had been issued in the first instance.

SEC. 628. If the person having such party in his custody, be brought before the court or judge as for a criminal offence, he shall be examined, committed, bailed or discharged by the court or judge in like manner as in other criminal cases of the like nature.

SEC. 629. Any officer or other person, refusing to deliver a copy of any order, warrant, process or other authority, by which he shall detain any person, to any one who shall demand such copy, and tender the fees therefor, shall forfeit two hundred dollars to the person so detained.

SEC. 630. Whenever a writ of habeas corpus is required, in any action, suit or proceeding, civil or criminal, to which the state is a party, the application therefor may be made by the district attorney having charge thereof, and whenever so issued, the court or judge shall state in the order of allowance that it was issued on such application.

SEC. 631. A writ of habeas corpus may be served by the sheriff of any county in the state, within his county, or by any other person therein designated in any county within the state, and the service thereof, shall not be deemed complete, so as to require the prisoner to be brought up before the court or judge issuing the same, unless the party serving the same, shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, or other officer, the fees allowed by law for bringing up such prisoner; nor unless he shall also enter into an undertaking to such sheriff, or other officer, as the case may be, in a penalty double the amount of the sum for which such prisoner may be detained, if he be detained for any specific sum of money; and if not, then in such a sum as the judge granting the writ shall direct, not exceeding one thousand dollars, to the effect that such person shall pay the charges for carrying back such prisoner if he shall be remanded, and that such prisoner will not escape by the way, either in going to or returning from the place to which he is to be taken. If such fees be not paid, or such security be not tendered, the officer to whom the writ is directed, shall make return thereto, in the manner required by section 604, and shall state therein the reason why such prisoner is not produced, and thereupon the court or judge granting the writ, may proceed as if the prisoner were produced. But this section from and inclusive of the words "and the service thereof," does not apply to a case wherein the writ is issued on the application of the district attorney.

SEC. 632. The writ of habeas corpus may be served by delivery of the original to the officer or person to whom it is directed, or if he cannot be found by leaving it at the jail or other place in which the party is imprisoned or restrained, with any under officer or other person having charge for the time of such party.

SEC. 633. If the officer or person on whom the writ ought to be served, conceal himself, or refuse admittance to the person attempting to serve it, it may be served by affixing it in some conspicuous place on the outside, either of his dwelling house or the jail or other place where the party is confined.

SEC. 634. It is the duty of every sheriff or other officer upon whom a writ of habeas corpus has been served, whether such writ be directed to him or not, upon payment or tender of the fees allowed by law, and the delivery or tender of the undertaking herein prescribed, to obey and return the writ according to the exigency thereof; and it is the duty of every other person, upon whom the writ is served, having the custody of the person, for whose benefit it is issued to obey and return it in like manner, without requiring the payment of any fees, unless the payment of such fees has been required by the court or judge allowing such writ.

SEC. 635. Every court or judge allowing a writ of habeas corpus directed to a person other than a sheriff or other officer, may, in its discretion, require in order to render the service effectual, that the charges of producing the party be paid by the applicant; and in such case the court or judge shall, in the order allowing the writ, specify the amount of such charges, which shall not exceed the fees allowed by law to sheriffs for similar services.

SEC. 636. The proof of service of the writ of habeas corpus shall be the same as in the service of a summons, except that the same shall be endorsed upon a copy of the writ made by the officer or person serving it, and returned to the clerk who issued the writ.

SEC. 637. If the writ be returnable at a certain time, such return shall be made, and the party produced if required, or there be no valid excuse therefor, as herein provided, at the time and place specified therein, if it be returnable forthwith, and the place of return be within twenty miles of the place of service, the return must be made and the party produced within twenty-four hours, and the same time is allowed for every additional twenty miles.

SEC. 638. The circuit court of the judicial district wherein the party is imprisoned or restrained, shall have exclusive jurisdiction of the proceeding by habeas corpus herein provided for: except that, the county court of the county wherein the party is imprisoned or restrained, may allow the writ or the warrant in lieu thereof provided for in section 625, and in such case such writ or warrant shall be made returnable before the circuit court, at the next term thereof for such county. At any time after the allowance of such writ or warrant by the county court or judge, the plaintiff therein, or the person applying therefor on his behalf, may give notice thereof to the judge of such circuit court, and thereupon if necessary to avoid delay, such judge shall by order require that the return be made, and the party produced before him at such time and place within the district as may be convenient.

SEC. 639. Any party to a proceeding by habeas corpus, including the state when the district attorney appears therein, may appeal from the judgment of the circuit court refusing to allow such writ, or any final judgment therein, either in term time or vacation, to the supreme court, in like manner and with like effect as in an action. No question once finally determined upon a proceeding by habeas corpus, shall be re-examined upon another or subsequent proceeding of the same kind.

TITLE IV.

The punishment of contempts.

Sec. 640. Contempts defined.
641. Punishment for contempt.
642. In presence of court, how punished.
643. In other cases, mode of proceeding.
644. If defendant imprisoned, may be brought up.
645. State is plaintiff, when district attorney may prosecute.
646. Warrant to direct, whether defendant shall be bailed or not, how warrant executed.
647. Bail how given.
648. Return of warrant, and proceedings on appearance of party.
649. Determination and sentence.
650. Judgment may also be given to indemnify party injured.
651. When party may be imprisoned, until he performs.
652. Person also liable to indictment.
653. If party do not appear, proceedings thereon.
654. Appeal from judgment.

Sec. 640. The following acts, or omissions, in respect to a court of justice, or proceedings therein, are deemed to be contempts of the authority of the court:

1. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial, or other judicial proceeding;

3. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding:

3. Misbehavior in office, or other wilful neglect or violation of duty, by an attorney, clerk, sheriff, or other person appointed or selected to perform a judicial or ministerial service;

4. Deceit, or abuse of the process or proceedings of the court, by a party of an action, suit or special proceeding;

5. Disobedience of any lawful judgment, decree, order or process of the court;

6. Assuming to be an attorney or other officer of the court, and acting as such without authority in a particular instance;

7. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

8. Unlawfully detaining a witness or party to an action, suit or proceeding, while going to, remaining at, or returning from the court, where the same is for trial;

9. Any other unlawful interference with the process or proceedings of a court;

10. Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness;

11. When summoned as a juror in a court, improperly conversing with a party to an action, suit or proceeding to be tried at such court, or with any other person in relation to the merits of such action, suit or proceeding, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, decree, order or process of a superior court, or proceeding in an action, suit, or proceeding contrary to law, after such action, suit or proceeding shall have been removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

The conduct specified in subdivisions 1 and 2 of this section, when committed before a judicial officer, or disobedience of the lawful order or process of such officer, made in the cases specified in section 890, is also to be deemed a contempt of the authority of such officer.

Sec. 641. Every court of justice, and every judicial officer, has power to punish contempts by fine or imprisonment, or both. But such fine shall not exceed three hundred dollars, nor the imprisonment six months; and when the contempt is not one of those mentioned in the first and second subdivisions of the last section, or in the first subdivision of section 890, it must appear that the right or remedy of a party to an action, suit or proceeding was defeated or prejudiced thereby, before the contempt can be punished otherwise than by a fine not exceeding one hundred dollars.

Sec. 642. When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily, for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against, is thereby guilty of a contempt, and that he be punished as therein prescribed.

Sec. 643. In cases other than those mentioned in section 642, before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer, and thereupon such court or officer, may either make an order upon the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person to answer in the first instance.

SEC. 644. If the party charged be in the custody of an officer, by virtue of a legal order or process, civil or criminal, except upon a sentence for a felony, an order may be made for the production of such person by the officer having him in custody, that he may answer and he shall thereupon be produced and held, until an order be made for his disposal.

SEC. 645. In the proceeding for a contempt, the state is the plaintiff. In all cases of public interest the proceeding may be prosecuted by the district attorney on behalf of the state and in all cases where the proceeding is commenced, upon the relation of a private party, such party shall be deemed a co-plaintiff with the state.

SEC. 646. Whenever a warrant of arrest is issued, pursuant to this title, the court or judicial officer shall direct therein, whether the person charged may be let to bail for his appearance upon the warrant, or detained in custody without bail, and if he may be bailed, the amount in which he may be let to bail. Upon executing the warrant of arrest, the sheriff must keep the person in actual custody, bring him before the court or judicial officer, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in section 647.

SEC. 647. The defendant shall be discharged from the arrest, upon executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking, with two sufficient sureties, to the effect that the defendant will appear on such return day, and abide the order or judgment of the court or officer thereupon, or pay, as may be directed, the sum specified in the warrant.

SEC. 648. The sheriff shall return the warrant of arrest, and the undertaking, if any, given him by the defendant, by the return day therein specified. When the defendant has been brought up or appeared, the court or judicial officer, shall proceed to investigate the charge by examining such defendant, and witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

SEC. 649. Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged, and if it be determined that he is so guilty, shall sentence him to be punished as provided in this title.

SEC. 650. If any loss or injury to a party in an action, suit or proceeding, prejudicial to his rights therein, have been caused by the contempt, the court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover off the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements, which judgment, and the acceptance of the amount thereof, is a bar to any action, suit or proceeding by the aggrieved party for such loss or injury.

SEC. 651. When the contempt consists in the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he shall have performed it, and in such case the act must be specified in the warrant of commitment.

SEC. 652. Persons proceeded against, according to the provisions of this title, are also liable to indictment for the same misconduct, if it be an indictable offence, but the court before which a conviction is had on the indictment in passing sentence, shall take into consideration the punishment before inflicted.

SEC. 653. When the warrant of arrest has been returned served, if the defendant do not appear on the return day, the court or judicial officer may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, and the aggrieved party join in the action, and the sum specified therein be recovered; so much thereof as will compensate such party for the loss or injury sustained by reason of the misconduct for which the warrant was issued, shall be deemed to be recovered for such party exclusively.

SEC. 654. Either party to a judgment in a proceeding for a contempt, may appeal therefrom, in like manner, and with like effect as from a judgment in an action, but such appeal shall not have the effect to stay the proceeding, in any other action, suit or proceeding, or upon any judgment, decree or order therein, concerning which, or wherein such contempt was committed. Contempts of justices' courts are punishable in the manner specially provided in the procedure before them.

CHAPTER VIII.

General definitions.

SEC. 655. Definition of evidence and proof.
656. Definition of law of evidence.
657. The degree of certainty necessary to establish a fact
658. Kinds of evidence, four in number.
659. Degrees of evidence.
660. Definition of original evidence.
661. Definition of secondary evidence.
662. Definition of direct evidence.
663. Definition of indirect evidence.
664. Definition of primary evidence.
665. Definition of partial evidence.
666. Definition of satisfactory evidence.
667. Definition of indispensable evidence.
668. Definition of conclusive evidence.
669. Definition of cumulative evidence.
670. Definition of corroborative evidence.

SEC. 655. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact. Proof is the effect of evidence, the establishment of a fact by evidence.

SEC. 656. The law of evidence which is the subject of this chapter and chapters IX. and X. is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining in certain cases the value and effect of evidence.

SEC. 657. The law does not require demonstration, that is, such a degree of proof as, excluding possibility of error produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof, which produces conviction in an unprejudiced mind.

SEC. 658. There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

SEC. 659. There are several degrees of evidence:

1. Original and secondary;
2. Direct and indirect;
3. Primary, partial, satisfactory, indispensable and conclusive.

Sec. 660. Original evidence is an original writing or material object introduced in evidence.

Sec. 661. Secondary evidence is a copy of such original writing or object or oral evidence thereof.

Sec. 662. Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: If the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

Sec. 663. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself, conclusively establish that fact, but which affords an inference or presumption of its existence. For example: A witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

Sec. 664. Primary evidence is that, which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example, the certificate of a recording officer is primary evidence of a record; but it may be afterwards overcome upon proof that there is no such record.

Sec. 665. Partial evidence is that, which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute, by proof of other facts. For example, on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the main fact in dispute.

Sec. 666. That evidence is deemed satisfactory, which ordinarily produces moral certainty, or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated insufficient evidence.

Sec. 667. Indispensable evidence is that, without which a particular fact cannot be proved.

Sec. 668. Conclusive or unanswerable evidence is that, which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

SEC. 669. Cumulative evidence is additional evidence of the same character, to the same point.

SEC. 670. Corroborative evidence is additional evidence of a different character, to the same point.

TITLE I.—*Of the general principles of evidence.*
TITLE II.—*Of the knowledge of the court.*
TITLE III.—*Witnesses.*
TITLE IV.—*Writings in general.*
TITLE V.—*Public writings.*
TITLE VI.—*Private writings and material objects.*
TITLE VII.—*Indirect evidence; inferences and presumptions.*
TITLE VIII.—*Indispensable evidence.*

TITLE I.

Of the general principles of evidence.

SEC. 671. One witness sufficient to prove a fact.
672. Testimony confined to personal knowledge, and upon oath or affirmation.
673. Witness presumed to speak the truth. How presumption overcome.
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681. Contents of a writing, how proved.
682. An agreement reduced to writing, to be deemed to include all its terms.
683. Construction of language, relates to place where instrument executed, unless otherwise expressed.
684. Construction of statutes and instruments, general rule.
685. Intention to govern, particular provision to control general one.
686. In the construction of an instrument the circumstances under which it was made may be considered.
687. Terms of a writing to be construed in their general acceptation, unless shewn otherwise.
688. Written words control printed ones.
689. Persons may testify to decipher characters or to translate language unknown to the court.
690. Of two constructions of an instrument, which preferred.
691. Written notice construed according to ordinary acceptation.
692. Statute to be construed in favor of natural right.
693. Material allegation only to be proved.
694. Evidence confined to material allegations. When court may allow inquiry as to a collateral fact.
695. Affirmative allegation only to be proved, unless negative essential to cause of action or defence.
696. Facts which may be proved on trial.

SEC. 671. The direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact, except usage, perjury and treason.

SEC. 672. A witness can be heard only upon oath or affirmation, and he can testify of those facts only which he knows of his own knowledge, that is, which are derived from his own perceptions; except in those few express cases, in which his opinions, or inferences or the declarations of others, are admissable.

SEC. 673. A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and where the trial is by the jury, they are the exclusive judges of his credibility.

SEC. 674. The rights of a party cannot be prejudiced by the declaration, act or omission of another, except by virtue of a particular relation between them.

SEC. 675. Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title, in relation to the property is evidence against the former.

SEC. 676. Where, also, the declaration, act or omission, forms part of a transaction, which is itself the fact in dispute or evidence of that fact, such declaration, act or omission, is evidence as part of the transaction.

SEC. 677. And where the question in dispute between the parties, is the obligation or duty of a third person, whatever would be evidence for or against such person, is primary evidence between the parties.

SEC. 678. The declaration, act or omission of a member of a family, who is deceased, or out of the state, is also admissable as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissable.

SEC. 679. The declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissable as evidence to that extent, against his successor in interest.

SEC. 680. When part of an act, declaration, conversation or writing, is given in evidence by one party, the whole, on the same subject, may be inquired into by the other; when a letter is read the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence.

SEC. 681. There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in section 749;

2. When the original cannot be produced, by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default;

3. When the original is a record, or other document, in the custody of a public officer;

4. When the original is a record or other document, of which a certified copy is expressly made evidence by this code or some other statute of the state;

5. When the originals consist of numerous accounts, or other documents, which cannot be examined in court, without great loss of time, and the evidence sought from them, is only the general result of the whole.

In the cases mentioned in subdivisions 3 and 4 a copy of the original shall be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents.

SEC. 682. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 686, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

SEC. 683. The language of a writing is to be interpreted, according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

SEC. 684. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare, what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and, where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.

SEC. 685. In the construction of a statute, the intention of the legislature, and in the construction of an instrument, the intention of the parties, is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one, that is inconsistent with it.

SEC. 686. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those, whose language he is to interpret.

SEC. 687. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible, that they have a technical, local, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement shall be construed accordingly.

SEC. 688. When an instrument consists partly of written words, and partly of a printed form, and the two are inconsistent, the former controls the latter.

SEC. 689. When the characters, in which an instrument is written, are difficult to be decyphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in decyphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.

SEC. 690. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail, against either party, in which he supposed the other understood it; and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party, in whose favor the provision was made.

SEC. 691. A written notice, is to be construed according to the ordinary acceptation of its terms. Thus a notice to the drawers or endorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, shall be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment, to the person to whom the notice is given.

SEC. 692. Where a statute, is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former is to prevail.

SEC. 693. None but a material allegation need be proved.

SEC. 694. Evidence shall correspond with the substance of the material allegations and be relevant to the questions in dispute. Collateral questions shall therefore be avoided. It is however within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

SEC. 695. Each party shall prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title, on which the cause of action or defence is founded, nor even in such case when the allegation is the denial of the existence of a document, the custody of which belongs to the adverse party.

SEC. 696. In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:

1. The precise fact in dispute;

2. The declaration, act or omission of a party as evidence against such party;

3. A declaration or act of another, in the presence and within the observation of a party, and his conduct in relation thereto;

4. The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person; the declaration or act of a deceased person, made or done against his interest in respect to his real property; and also in criminal actions, the declaration or

act of a dying person, made or done under a sense of impending death, respecting the cause of his death;

5. After proof of a partnership or agency, the declaration or act of a partner or agent of the party, within the scope of the partnership or agency, and during its existence; the same rule applies to the declaration or act of a joint owner, joint debtor or other person jointly interested with the party;

6. After proof of a conspiracy, the declaration or act of a conspirator against his co-conspirator, and relating to the conspiracy:

7. The declaration, act or omission forming part of the transaction, as explained in section 676.

8. The testimony of a witness, deceased, or out of the state, or unable to testify, given in a former action, suit or proceeding, or trial thereof between the same parties, relating to the same matter:

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer, and the opinion of an intimate acquaintance, respecting the mental sanity of a person, the reason for the opinion being given;

11. Common reputation, existing previous to the controversy, respecting facts of a public or general interest, more than thirty years old, and in cases of pedigree and boundary;

12. Usage, to explain the true character of an act, contract or instrument, where such true character is not otherwise plain, but usage is never admissable except as a means of interpetration;

13. Monuments and inscriptions in public places, as evidence of common reputation, and entries in family bibles or other family books or charts, engravings on rings, family portraits, and the like as evidence of pedigree;

14. The contents of a writing when oral evidence thereof is admissable;

15. Any other facts from which the facts in issue are presumed, or are logically inferrable;

16. Such facts as serve to shew the credibility of a witness, as explained in section 673.

TITLE II.

Knowledge of the Court.

Sec. 697. Certain facts, assumed to be true.
698. Specification of such facts.

Sec. 697. There are certain facts of such general notoriety, that they are assumed to be already known to the court. Of those facts evidence need not be produced.

Sec. 698. The following facts are assumed to be thus known:

1. The true signification of all English words and phrases, and all legal expressions;
2. Whatever is established by law;
3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States;
4. The seals of all the courts of this state and of the United States;
5. The accession to office, and the official signatures and seals of office, of the principal officers of government, in the legislative, executive and judicial departments of this state, and of the United States;
6. The existence, title, national flag and seal of every state or sovereign recognized by the executive power of the United States;
7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;
8. The laws of nature, the measure of time, and the geographical divisions and political history of the world;

In all these cases, the court may resort for its aid to appropriate books or documents of reference.

TITLE III.

Witnesses.

Sec. 699. Witness defined.
700. Who may be witnesses.
701. Who cannot be witnesses.
702. Persons in certain relations to parties.
703. What deemed a consent by the party to the examination of privileged persons.

Sec. 699. A witness is a person whose declaration under oath or affirmation is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit.

Sec. 700. All persons without exception, except as otherwise provided in this title, who, having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore neither parties, nor other persons who have an interest in the event of an action, suit or proceeding, are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case, except the latter, the credibility of the witness may be drawn in question, as provided in section 673.

SEC. 701. The following persons are not admissible:

1. Those of unsound mind at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

SEC. 702. There are particular relations, in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband shall not be examined, for or against his wife, without her consent, nor a wife, for or against her husband, without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage. But the exception does not apply to a civil action, suit or proceeding, by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney shall not, without the consent of his client, be examined, as to any communication made by the client to him, or his advice given thereon, in the course of professional employment;

3. A priest, or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline, enjoined by the church to which he belongs;

4. A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

5. A public officer shall not be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

SEC. 703. If a party to the action suit or proceeding offer himself as a witness, that is to be deemed a consent to the examination also, of a wife, husband, attorney, clergyman, physician or surgeon on the same subject within the meaning of the first four subdivisions of the last section.

TITLE IV.

Writings in general.

SEC. 704. Writings public and private.
705. Public writings defined.
706. What are private.

SEC. 704. Writings are of two kinds:

1. Public; and,
2. Private.

SEC. 705. Public writings are:

1. The written acts, or records of the acts, of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, whether of this state, of the United States, of a sister state, or of a foreign country.

SEC. 706. All other writings are private.

TITLE V.

Public writings.

SEC. 707. Every citizen entitled to inspect public writings.
708. Public officers to give copies on demand and payment of fees.
709. Four kinds of public writings.
710. Laws, either written or unwritten.
711. Written laws defined.
712. Written law of this state.
713. Public and private statutes defined.
714. Unwritten law defined.
715. Books containing laws of other states, presumed to be correct.
716. Public seal to a copy of a written law authenticates it.
717. Evidence of unwritten law of other states.
718. Recitals in a statute, how far conclusive evidence.
719. Judicial record, defined.
720. Record of this state, the United States, or a sister state, how proved.
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SEC. 732. Jurisdiction necessary to sustain a record.
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737. Same subject.
738. Official certificates, what to contain.
739. Provisions of this title applicable to sister states, also applicable to public writings of district of Columbia or a territory of the United States.

SEC. 707. Every citizen of this state has a right to inspect any public writing of this state, except as otherwise expressly provided by this code or some other statute.

SEC. 708. Every public officer, having the custody of a public writing, which a citizen has a right to inspect, is bound to give him on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is primary evidence of the original writing.

SEC. 709. Public writings are divided into four classes:

1. Laws;
2. Judicial records;
3. Other official documents;
4. Public records, kept in this state, of private writings;

SEC. 710. Laws whether organic or ordinary, are either written or unwritten.

SEC. 711. A written law is that which is promulgated in writing, and of which a record is in existence.

SEC. 712. The organic law is the constitution of the United States and of this state, and is altogether written. Other written laws are denominated statutes. The written law of this state is therefore contained in its constitution and statutes, and in the constitution and statutes of the United States.

SEC. 713. Statutes are public or private. A private statute, is one which concerns only certain designated persons, and affects only their private rights. All other statutes are public, in which are included, statutes creating or affecting corporations.

SEC. 714. Unwritten law is the law not promulgated and recorded, as mentioned in section 711, but which is nevertheless observed and administered in the courts of the state. It has no certain repository; but is collected from the reports of the decisions of courts and the treatises of learned men.

SEC. 715. Books, printed or published, under the authority of a sister state, or foreign country, and purporting to contain the statutes, code, or other written law, of such state or country, or proved to be commonly admitted in the tribunals of such state, or country, as evidence of the written law thereof, are admissible in this state, as evidence of such law.

SEC. 716. The public seal of the state or county, affixed to a copy of a written law, is also admissible as evidence of such law or writing.

SEC. 717. The oral testimony of witnesses skilled therein, is admissible as evidence of the unwritten law, of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state, or country, or proved to be commonly admitted in such courts.

SEC. 718. The recitals in a public statute, are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute, are conclusive evidence of the facts recited, between parties who claim under its provisions, but no further.

SEC. 719. A judicial record, is the record, official entry or files of the proceedings in a court of justice, or of the official act of a judicial officer, in an action, suit or proceeding.

SEC. 720. A judicial record of this state or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk, or other person having the legal custody thereof, with the seal of the court affixed thereto, if there be a seal. That of a sister state may be proved by the production of a copy thereof, certified by the clerk or other person having the legal custody of the record, with the seal of the court affixed thereto, if there be a seal, together with the certificate of the chief judge, or presiding magistrate that the certificate is in due form and made by the clerk or other person having the legal custody of the original.

SEC. 721. A judicial record of a foreign country, may be proved by the production of a copy thereof, certified by the clerk or other person having the legal custody of the record, with the seal of the court affixed thereto, if there be a seal, together with the certificate of the chief judge, or presiding magistrate that the certificate is in due form and made by the clerk or other person having the legal custody of the original, and also, together with the certificate of the Secretary of State or other officer of the government, having the custody of the great or principal seal of such government, to the effect that the court or officer, whose judicial act or proceeding is certified, had jurisdiction to perform the same, specifying generally the nature of the jurisdiction and verifying the signature of the clerk or other legal keeper of the record, and also the signature of the chief judge or presiding magistrate.

SEC. 722. A copy of the judicial record of a foreign country is also admissible in evidence upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;
2. That such original was in the custody of the clerk or other legal keeper of the same; and
3. That the copy has affixed to it a seal, which is proved to be the seal of the court where the original record remains, or if there be no such seal, the signature of the legal keeper of the record.

SEC. 723. The effect of a judgment, decree or final order, in an action suit or proceeding, before a court or judge thereof of this state or of the United States, having jurisdiction to pronounce the same, is as follows:

1. In case of a judgement, decree, or order, against a specific thing, or in respect to the probate of a will or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree, or order, is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person;
2. In other cases, the judgment, decree, or order is, in respect to the matter directly determined conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the action suit or proceeding, litigating for the same thing, under the same title, and in the same capacity.

SEC. 724. Other judicial orders of a court or judge thereof of this state or of the United States, create a disputable presumption concerning the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action suit or proceeding, litigating for the same thing, under the same title, and in the same capacity.

SEC. 725. The parties are deemed to be the same, when those, between whom the evidence is offered, were adverse to each other in the former case, and a judgment, decree or other determination, could in that case have been made between them alone, though other parties were joined with both or either.

SEC. 726. That only is deemed to have been determined by a former judgment, decree or order, which appears upon its face to have been so determined, or which was actually and necessarily included therein, or necessarily thereto.

SEC. 727. Whenever, pursuant to the last four sections a party is bound by a record, and such party stands in the relation of surety for another, the latter is also bound, from the time that he has notice of the action suit or proceeding, and a request from the surety to defend against the same.

SEC. 728. The effect of a judicial record of a sister state, is the same in this state as in the state where it was made, except that it can only be enforced here by an action, suit or proceeding, and except also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government, under which he was invested with his authority.

SEC. 729. The effect of the judicial record of a court of admiralty of a foreign country, is the same as if it were the record of a court of admiralty of the United States.

SEC. 730. The effect of the judgment, decree or final order of any other tribunal of a foreign country, having jurisdiction to pronounce the same, is as follows:

1. In case of a judgment, decree or order against a specific thing, the same is conclusive, upon the title to the thing;

2. In case of a judgment, decree or order against a person, the same creates a disputable presumption of a right, as between the parties, and their representatives and successors in interest by title subsequent, and can only be overcome by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

SEC. 731. Any judicial record may be impeached, and the presumption arising therefrom overcome, by evidence of a want of jurisdiction in the court or judicial officer, or collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

SEC. 732. The jurisdiction sufficient to sustain a record, is jurisdiction over the cause, over the parties, and over the thing when a specific thing is the subject of the determination.

SEC. 733. Other official documents may be proved as follows:

1. Acts of the executive or administrative departments of this state and of the United States by the records of such departments, certified by the heads thereof respectively; they may also be proved by public documents, prepared or printed by order of the legislative assembly, or Congress, or either house thereof;

2. The proceedings of the legislative assembly of this state, or of Congress, by the journals of those bodies respectively, or either house thereof, or by statutes or resolutions, published by their order, or by copies thereof, certified by the clerk or other legal keeper of the originals.

3. The acts of the executive or administrative departments or the proceedings of the legislature, of a sister state, in the same manner;

4. The acts of the executive or administrative departments, or the proceedings of the legislature, of a foreign country, by journals, statutes or resolutions, published by their authority respectively, or commonly received in that country as such, or by a copy thereof, certified under the great or principal seal of such country or the sovereign thereof, or by a recognition thereof, in or by some public act of the executive of the United States;

5. Acts of a public corporation of this state, or of a board or department thereof, by a copy certified by the legal keeper thereof, or by a printed copy published by the authority of such corporation or department thereof.

6. Documents of any other class in this state, or the United States, by the original, or by a copy certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original or by a copy certified by the legal keeper thereof, together with the certificate of the Secretary of State, judge of a court of record or mayor of a city, of such state, that the copy is duly certified by the officer having the legal custody of the original;

8. Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, together with a certificate under the great or principal seal of the country or

sovereign thereof, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original.

SEC. 734. A public record of a private writing, may be proved by the original record, or, by a copy thereof certified by the legal keeper of the record.

SEC. 735. Entries in public, or other official books or records, made in the performance of his duty, by a public officer of this state, or of the United States, or by another person in the performance of a duty specially enjoined by the law of either, are primary evidence of the facts stated therein.

SEC. 736. A transcript from the record or docket of a justice of the peace of a sister state, of a judgment given by him, of the proceedings in the action or proceeding before the judgment, and subsequent thereto, if any, verified in the manner prescribed in the next section, is primary evidence of the facts stated therein.

SEC. 737. There shall be attached to the transcript, a certificate of the justice, having the legal custody of the record or docket, that the transcript is in all respects correct and complete, and that the justice who gave the judgment had jurisdiction of the action, together with the certificate of the clerk of the county, having official cognizance of the fact, in which the justice resided at the time of giving the judgment, under the seal of his office, that the person certifying the transcript was at the date thereof a justice of the peace in the county, and that the signature is genuine.

SEC. 738. Whenever a copy of a writing is certified to be used as evidence, the certificate shall state that the copy has been compared by the certifying officer with the original, and that it is a correct transcript therefrom, and of the whole of such original, or of a specified part thereof. The official seal, if there be any, of the certifying officer, shall also be affixed to such certificate or any other certificate except when the certificate of a clerk of a court is used in the same court or before an officer thereof.

SEC. 739. The provisions of this title, applicable to the public writings of a sister state, are in like manner applicable to the public writings of the District of Columbia or a territory of the United States.

TITLE VI.

Private writings and material objects.

SEC. 740. Private writings classified.
741. Seal defined.
742. Manner of making it.
743. Seal, effect of.
744. Execution of a writing defined.
745. Agreement to settle or compromise, without seal, good.
746. Last three sections not to dispense with seal, where required by other statute.
747. Subscribing witness defined.
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749. Original writing to be produced, when in possession of adverse party.
750. Writing called for and inspected, need not be offered.
751. Proof, where there is a subscribing witness.
752. When proof made by other witnesses.
753. When writing in the custody of adverse party or has been admitted by him.
754. Evidence of hand writing.
755. By comparison of hand writings.
756. Same subject.
757. Entries of persons deceased or out of the State.
758. Where entry is copied at the time from one book to another.
759. Proof by material objects other than writings.

SEC. 740. Private writings are either,

1. Sealed; or
2. Unsealed.

SEC. 741. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument.

SEC. 742. A public seal in this state is a stamp or impression made upon wax, wafer, paper, or any other like substance, upon which a visible and permanent impression can be made. A private seal may be made in the same manner, or it may be made without an impression, by a wafer or wax attached to the instrument, or by a paper attached to it by an adhesive substance. A scroll or other sign made in a sister state, territory of the United States, district of Columbia or a foreign country, and there recognized as a seal, shall be so regarded in this state, except so far as the same may affect any interest in real property, in this state.

SEC. 743. The seal affixed to a writing is primary evidence of a consideration. In other respects there is no difference between sealed or unsealed writings, except as to the time of commencing actions or suits thereon. A writing under seal may therefore be modified, or discharged, by a writing not under seal or by an oral agreement otherwise valid.

SEC. 744. The execution of a writing is the subscribing and delivering it, with or without affixing a seal.

SEC. 745. An agreement in writing, without a seal, for the compromise or settlement of a debt or controversy, is as obligatory, as if a seal were affixed.

SEC. 746. The last three sections shall not be construed to dispense with a seal to a deed or other writing, where the same is required by any statute of this state.

SEC. 747. A subscribing witness, is one who sees a writing executed, or hears it acknowledged, and at the request of the party, thereupon signs his name as a witness.

SEC. 748. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest.

SEC. 749. The original writing shall be produced and proved except as provided in section 681. If the writing be in the custody of the adverse party he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it, is not necessary where the writing itself is a notice, or where it has been wrongfully obtained or withheld by the adverse party.

SEC. 750. Though a writing, called for by one party, is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to offer it as evidence in the case.

SEC. 751. If there be a subscribing witness to a writing, offered in evidence, its execution shall be proved by him, if he be living and within the state, and can testify. If there be more than one subscribing witness the evidence of one is sufficient. If all the subscribing witnesses be dead, or out of the state, or incapable of testifying, the handwriting of one of them, and that of the party shall be proved.

SEC. 752. If the subscribing witness denies, or does not recollect, the execution of the writing, its execution may then be proved by other evidence.

SEC. 753. Where however, evidence is given that the party, against whom the writing is offered, has at any time admitted its execution, no other evidence of the execution need be given, if the instrument be one mentioned in section 756, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

SEC. 754. The handwriting of a person may be shown, by any one who believes it to be his, and who has seen him write, or has seen writing purporting to have been his, upon which he has acted or been charged, and who has thus acquired a knowledge of his hand writing.

SEC. 755. Evidence respecting the handwriting may also be given, by a comparison, made by a witness skilled in such matters, or the jury, with writings, admitted or treated as genuine by the party against whom the evidence is offered.

SEC. 756. When a writing is more than twenty years old, the comparision may be made with writings, purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

SEC. 757. The entries or other writings of a like character of a person deceased, or without the state, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read, as primary evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it; or

2. When it was made in a professional capacity, and in the ordinary course of professional conduct; or

3. When it was made in the performance of a duty specially enjoined by law.

SEC. 758. When an entry is repeated, in the regular course of business, one being copied from another, at or near the time of the transaction, all the entries are equally regarded as originals.

SEC. 759. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute, as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation and character may be proved by witnesses. The exhibition of such object to the jury shall be rugulated by the sound discretion of the court.

TITLE VII.

Indirect evidence; inferences and presumptions.

SEC. 760. Indirect evidence of two kinds.
761. Inference defined.
762 Presumption defined.
763. Upon what an interest is founded
764. Presumption may be controverted, when
765. Specification of conclusive presumptions.
766. Specification of certain disputable presumptions.

SEC. 760. Indirect evidence is of two kinds:

1. Inferences; and
2. Presumptions.

SEC. 761. An inference is a deduction, which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

SEC. 762. A presumpsion is a deduction, which the law expressly directs to be made from particular facts.

SEC. 763. An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

SEC. 764. A presumption, unless declared by law to be conclusive, may be overcome by other evidence, direct or indirect; but unless so overcome, the jury are bound to find according to the presumption.

SEC. 765. The following presumptions and no others, are deemed conclusive:

1. An intent to murder, from the deliberate use of a deadly weapon, causing death within a year.
2. A malicious and guilty intent from the deliberate commission of an unlawful act, for the purpose of injuring another.
3. The truth of the facts recited from the recital in a written instrument, between the parties thereto, their representatives or successors in interest, by a subsequent title; but this rule does not apply to the recital of a consideration.
4. Whenever a party has, by his own declaration, act or omission, intentionally, and deliberately led another to believe a particular thing true, and to act upon such belief, he shall not, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.
5. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.
6. That the issue of a wife cohabiting with her husband, who is not impotent, is legitimate.
7. The judgment, decree or order of a court, when declared by this code to be conclusive; but such judgment, decree or order shall

be pleaded, if there be an opportunity to do so; and if there be no such opportunity it may be used as evidence with like effect.

8. Any other presumption which by statute, is expressly made conclusive.

Sec. 766. All other presumptions are satisfactory, unless overcome. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong;

2. That an unlawful act was done with an unlawful intent;

3. That a person intends the ordinary consequence of his voluntary act.

4. That a person takes ordinary care of his own concerns.

5. That evidence wilfully suppressed would be adverse to the party suppressing it, if produced.

6. That higher evidence would be adverse, from inferior being produced.

7. That money paid by one to another, was due to the latter.

8. That a thing delivered by one to another, belonged to the latter.

9. That an obligation, delivered up to the debtor, has been paid.

10. That former rent, or instalments of a debt have been paid when a receipt for later is produced.

11. That things in the possession of a person, are owned by him.

12. That a person is the owner of property, from exercising acts of ownership over it, or from common reputation of his ownership.

13. That a person in possession of an order on himself, for the payment of money, or the delivery of a thing, has paid the money, or delivered the thing accordingly.

14. That a person acting in a public office, was regularly appointed to it.

15. That official duty has been regularly performed.

16. That a court or judge acting as such, whether in this state, or any other state or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusive, does still correctly determine, or set forth the rights of the parties.

18. That all matters, within an issue, were submitted to the jury, and passed upon by them.

19. That private transactions have been fair and regular.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange, was given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange, was made at the time and place of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed, was received in the regular course of the mail.

25. Identity of person, from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief, that the thing acquiesced in was conformable to the right or fact.

28. That things have happened, according to the ordinary course of nature, and the ordinary habits of life.

29. That persons acting as copartners, have entered into a contract of copartnership.

30. That a man and woman, deporting themselves as husband [and] wife, have entered into a lawful contract of marriage.

31. That a wife, acting with her husband, in the commission of a felony other than murder, acted by coercion and without guilty intent.

32. That a child born in lawful wedlock, there being no divorce from bed or board, is legitimate.

33. That a thing once proved to exist, continues as long, as is usual with things of that nature.

34. That the law has been obeyed.

35. That a document or writing, more than twenty years old, is genuine, when the same has been generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

36. That a printed and published book, purporting to be printed and published by public authority, was so printed or published.

37. That a printed and published book, purporting to contain reports of cases determined in the tribunals of the state or country, where the book is published, contains correct reports of such cases.

38. That an uninterrupted, adverse possession of real property for twenty years, or more, has been held pursuant to a written conveyance.

39. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed it to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

40. Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only, by making it appear on the part of the person claiming under such sale or assignment, that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers. But the presumption herein specified, does not exist in the case of mortgage duly filed or recorded as provided by law.

41. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed, from the probabilities resulting from the strength, age, and sex, according to the following rules:

First. If both those who have perished were under the age of fifteen years, the older is presumed to have survived;

Second. If both were above the age of sixty years, the younger is presumed to have survived.

Third. If one be under fifteen and the other above sixty years, the former is presumed to have survived.

Fourth. If both be over fifteen and under sixty years, and the sexes be different, the male is presumed to have survived; if the sexes be the same then the older.

Fifth. If one be under fifteen or over sixty years, and the other between those ages, the latter is presumed to have survived.

TITLE VIII.

Indispensable evidence.

SEC. 767. Indispensable evidence, what.
768. Evidence to prove usage, perjury and treason.
769. Evidence to prove will.
770. Evidence of alteration or revocation.
771. Evidence of sale or transfer of real property.

Sec. 772. Last section not to affect certain cases.
773. Evidence of sale or transfer of vessel.
774. Evidence of authority to execute sealed instrument.
775. Agreement not in writing, when void.
776. Evidence of representations as to third persons.

Sec. 767. Certain evidence is necessary to the validity of particular acts, or the proof of particular facts.

Sec. 768. Usage, perjury and treason shall be proved by the testimony of more than one witness; usage by the testimony of at least two witnesses; treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

Sec. 769. A last will and testament, except when made by a soldier, in actual military service, or by a mariner at sea, is invalid, unless it be in writing, and executed with such formalities as are required by law. Evidence, therefore, of such will shall not be received, other than the written instrument itself, or secondary evidence of its contents, in the cases prescribed by law.

Sec. 770. A written will cannot be revoked or altered, otherwise than by another written will, or another writing of the testator, declaring such revocation or alteration, and executed with the same formalities required by law for the will itself; or unless the will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person, in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

Sec. 771. No estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law.

Sec. 772. The last section shall not be construed to affect the power of a testator, in the disposition of his real property by a last will and testament, nor to prevent a trust from arising or being extinguished by implication or operation of law, nor to affect the power of a court, to compel specific performance of an agreement in relation to such property.

SEC. 773. A sale or transfer of a vessel is not valid, unless it be in writing, and signed by the party making the transfer.

SEC. 774. The authority to execute a sealed instrument for another, shall be under seal, if the sealing of the instrument be essential to its validity.

SEC. 775. In the following cases the agreement is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence therefore of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed law:

1. An agreement that, by its terms, is not to be performed within a year from the making thereof.

2. An agreement to answer for the debt, default, or miscarriage of another.

3. An agreement by an executor or administrator to pay the debts of his testator or intestate out of his own estate.

4. An agreement made upon consideration of marriage, other than a mutual promise to marry.

5. An agreement for the sale of personal property, at a price not less than fifty dollars, unless the buyer accept and receive some part of such personal property, or pay at the time some part of the purchase money; but when the sale is made by auction, an entry by the auctioneer, in his sale-book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

6. An agreement for the leasing, for a longer period than one year, or for the sale of real property or of any interest therein.

7. An agreement concerning real property, made by an agent of the party sought to be charged, unless the authority of the agent be in writing.

SEC. 776. No evidence is admissible to charge a person upon a representation, as to the credit, skill, or character of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

CHAPTER IX.

TITLE I.—*By whom evidence to be produced.*
TITLE II.—*Means of the production of evidence.*
TITLE III.—*Mode of taking the testimony of witnesses.*
TITLE IV.—*Affidavits.*
TITLE V.—*Depositions.*
TITLE VI.—*Manner of taking depositions out of the state.*
TITLE VII.—*Manner of taking depositions in the state.*
TITLE VIII.—*General rules of examination.*
TITLE IX.—*Of the effect of evidence.*
TITLE X.—*Of the rights and duties of witnesses.*

TITLE I.

By whom evidence to be produced.

Sec. 777. Evidence to be produced by party having the affirmative.
778. Alteration in writing, who to explain.

Sec. 777. The party having the affirmative of the issue shall produce the evidence to prove it. Therefore the burden of proof lies on the party, who would be defeated, if no evidence were given on either side.

Sec. 778. The party producing a writing, as genuine, which has been altered, or appears to have been altered, after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that he may give the writing in evidence, but not otherwise.

TITLE II.

Means of the production of evidence.

SEC. 779. Subpœna for witness defined.
780. Subpœna, how and by whom issued.
781. Subpœna, when and to whom issued in blank.
782. Subpœna, how served.
783. How served if witness concealed.
784. Proof of service, same as in case of summons.
785. When witness obliged to attend.
786. Person present, compelled to testify.
787. Subpœna, disobedience to, how punished.
788. Forfeiture therefor.
789. When warrant may issue to bring witness.
790. Warrant of arrest or commitment.
791. If witness be a prisoner, how produced or examined.

SEC. 779. The process by which the attendance of a witness is required, is a subpœna. It is a writ directed to a person, and requiring his attendance, at a particular time and place, to testify as a witness in a particular action, suit or proceeding therein specified, on behalf of a particular party therein mentioned. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

SEC. 780. The subpœna is issued as follows:

1. To require attendance before a court of record, or at the trial of an issue therein; or out of such court in an action suit or proceeding pending therein, by the clerk of such court.

2. To require attendance before a commissioner, appointed to take testimony, by a court of the United States, or a territory thereof, a sister state, or any foreign country, by any clerk of a court of record, in places within the jurisdiction of such court.

3. To require attendance before a judge, justice of the peace or other person authorized by law to take the testimony or affidavit of another, by such judge, justice of the peace or other person, in places within their respective jurisdiction.

SEC. 781. The subpœnas authorized by subdivisions 1 and 2 of the last section, upon the request of a party or an attorney of the court shall be issued by the clerk in blank and delivered to such party or attorney, who may thereafter fill up such blank with the name of the witness or witnesses that he may desire to be subpœnaed and cause the same to be served as in this title required.

SEC. 782. A subpœna may be served by the party or any other person over eighteen years of age. The service is made by reading and showing the original and delivering a copy or ticket containing its substance, to the witness personally, giving or offering to him at the same time, the fees to which he is entitled, for travel to and from the place designated, and one day's attendance there. Such service must be made, so as to allow the witness a reasonable time, for preparation and travel to the place of attendance.

SEC. 783. A sheriff, his deputy, or some person specially appointed by him, but none other, is authorized and required to break into any building or vessel in which a witness may be concealed, so as to prevent the service of a subpœna, and serve the same upon such witness.

SEC. 784. Proof of service of a subpœna shall be made in the same manner as in the service of a summons.

SEC. 785. A witness is not obliged to attend for oral examination or otherwise, at a place outside of the county in which he resides, or in which he may be served with the subpœna, unless his residence be within twenty miles of such place; except that, in an action, suit or proceeding, pending in a court of record, the court or judge thereof upon the affidavit of the party or some one on his behalf, showing that the testimony of the witness is material, and his oral examination important and desirable, may endorse upon the subpœna an order for the attendance of the witness; the service of such subpœna and order, and the payment of double fees to the witness, are sufficient to require his attendance if he be served within the state, in the same manner as if he resided in the county.

SEC. 786. A person present in court or before a judicial officer, may be required to testify, in the same manner, as if he were in attendance before such court or officer upon a subpœna.

SEC. 787. Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer before whom he is required to attend or the refusal takes place, and if the witness be a party, his complaint, answer or reply may be stricken out.

SEC. 788. A witness disobeying a subpœna duly served shall also forfeit to the party requiring his attendance the sum of fifty dollars, and all damages which he may sustain, by the failure of the witness to attend; which forfeiture and damages may be recovered by an action at law.

SEC. 789. In case of the failure of a witness to attend, the court or officer before whom he is required to attend, upon proof of the due service of the subpœna and the failure of the witness may issue a warrant to the sheriff of the county, requiring him to arrest the witness, and bring him before the court or officer where his attendance was required.

Sec. 790. Every warrant of commitment, issued by a court or officer, pursuant to this title, shall specify therein the cause of the commitment and if it be for refusing to answer a question, such question shall be stated in the warrant. A warrant to arrest or commit a witness shall be directed to the sheriff of the county in which the witness is attending, or is required to attend.

Sec. 791. If the witness be a prisoner, confined in a prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production, before a court or officer, for the purpose of being orally examined, may be made as follows:

1. By the court or judge thereof in which the action, suit or proceeding is pending, unless it be a court of a justice of the peace.

2. By any judge of a court of record, when the action, suit or proceeding is pending in a justice's court, or when the witness' deposition, affidavit, or oral examination is required before a judge or other person out of court.

3. Such order shall only be made upon the affidavit of the party desiring the order or some one on his behalf, showing the nature of the action, suit or proceeding, the testimony expected from the witness and its materiality.

4. If the witness be imprisoned in the county where the action, suit or proceeding is pending, and for a cause other than a sentence for felony, his production may be required; in all other cases his examination shall be taken by deposition.

TITLE III.

Mode of taking the testimony of witnesses.

Sec. 792. Testimony, taken in three modes.
793. Affidavit, definition of.
794. Depositions, definition of.
795. Oral examination, definition of.
796. Affidavit or deposition, how taken.
797. How authenticated, if taken in other state or country.

Sec. 792. The testimony of a witness is taken in three modes:

1. By affidavit;
2. By deposition;
3. By oral examination.

SEC. 793. An affidavit is a written declaration under oath, made without notice to the adverse party.

SEC. 794. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

SEC. 795. An oral examination, is an examination in presence of the jury or tribunal, which is to decide the fact, or act upon it, the testimony being heard by the jury, from the mouth of the witness.

SEC. 796. In all affidavits and depositions, the witness must be made to speak in the first person. Depositions shall be taken in the form of question and answer, unless the parties agree to a different mode.

SEC. 797. An affidavit or deposition taken in another state of the United States, or a territory thereof, the district of Columbia, or in a foreign country, otherwise than upon commission, must be authenticated as follows, before it can be used in this state:

1. It must be certified by a commissioner, appointed by the governor of this state to take affidavits and depositions in such other state, territory, district or country; or

2. It must be certified, by a judge of a court having a clerk and a seal to have been taken and subscribed before him, at a time and place therein specified, and the existence of the court, the fact that such judge is a member thereof, and the genuineness of his signature, shall be certified by the clerk of the court, under the seal thereof.

TITLE IV.

Affidavits.

SEC. 798. Affidavit, when may be used
799. When deponent to be produced for cross-examination.
800. Proof of publication, may be made by affidavit.
801. Where affidavit may be filed, and effect thereof, or of a copy.

SEC. 798. An affidavit may be used to prove the service of a summons, notice, or other paper in an action, suit or proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly provided by this code or other statute of the state, except as provided in the next section.

SEC. 799. Whenever a provisional remedy has been allowed upon affidavit, the party against whom it is allowed, may serve upon the party by whom it was obtained, a notice requiring the person making the affidavit to be produced before some officer authorized to administer oaths, therein named, for cross-examination. Thereupon the party to whom the remedy was allowed, shall lose the benefit of the affidavit and all proceedings founded thereon, unless within eight days, or such other time as the court or judge thereof may direct, upon a previous notice to his adversary of at least three days, he produce the deponent for examination, before the officer mentioned in the notice, or some other of like authority provided for in the order of the court or judge. Upon such production, the deponent may be examined by either party; but a party shall not be obliged to produce a witness for examination as in this section provided except within the county where the provisional remedy was allowed.

SEC. 800. Proof of the publication of a document or notice required by law, or by an order of court or a judge, to be published in a newspaper, may be made by the affidavit of the printer of the newspaper or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which, the publication was made. But such affidavit must be made within six months after the last day of publication.

SEC. 801. If such affidavit be made in an action, suit or proceeding pending in a court, it may be filed with the clerk thereof, if not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case the original affidavit or if the same be filed with the clerk, a copy thereof duly certified, is primary evidence of the facts stated therein.

TITLE V.

Depositions.

SEC. 802. Deposition, when used.
803. Testimony of witness out of the state, when taken in an action at law or proceeding.
804. In same case, in the state, when taken.
805. In suit in equity.

SEC. 802. In all cases other than those mentioned in section 798 where a written declaration under oath is used, it must be a deposition as prescribed by this code.

SEC. 803. The testimony of a witness out of the state, may be taken by deposition in an action at law, at any time after the service of the summons or the appearance of the defendant, and in a special proceeding, at any time after a question of fact has arisen therein.

SEC. 804. The testimony of a witness in this state may be taken by deposition, in an action at law, at any time, after the service of the summons or the appearance of the defendant, and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding by the adverse party.

2. When the witness' residence is such that he is not obliged to attend in obedience to a subpœna as provided in section 785.

3. When the witness is about to leave the county and go more than twenty miles beyond the place of trial.

4. When the witness otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

SEC. 805. The testimony of a witness in a suit in equity, is taken by deposition, as elsewhere provided in this code, and in the manner provided in this chapter, unless the court makes an order, as it is hereby empowered to, of reference, to take the testimony in the cause and report the same to the court. In such case the witness shall be examined before the referee, and his testimony reduced to writing and subscribed in the same manner as in ordinary cases of reference.

TITLE VI.

Manner of taking depositions out of the state.

SEC. 806. Testimony of a witness out of the state, how taken.
807. Commission, how and by whom issued.
808. Interrogatories may be annexed.
809. Contents of commission.
810. Trial, when postponed therefor.
811. Deposition taken out of state before commissioner on notice to adverse party.
812. Either party may attend, or require written interrogatories.

SEC. 806. The deposition of a witness out of the state, may be taken upon commission issued from the court, or without commission, before a commissioner appointed by the governor of this state to take depositions in other states or countries.

Sec. 807. The commission may be issued by the clerk of the court, or by a justice of the peace in a cause in his own court, on the application of either party upon five days' previous notice to the other. It shall be issued to a person agreed upon by the parties, or if they do not agree, to a judge, justice of the peace, notary public, or clerk of a court, selected by the officer issuing it.

Sec. 808. Such interrogatories, direct and cross, as the respective parties may prepare, to be settled by the clerk or justice in a summary manner as to the form thereof, if the parties disagree, may be annexed to the commission, or when the parties agree to that mode, the examination may be without written interrogatories.

Sec. 809. The commission shall authorize the commissioner, to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without them, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope directed to the clerk or justice who issued the commission, or other person designated and agreed upon, and forwarded to him by mail, or other usual channel of conveyance.

Sec. 810. A trial or other proceeding shall not be postponed by reason of a commission not being returned, except it appear by affidavit that the testimony of the witness is material and necessrry, and that proper diligence has been used to obtain it.

Sec. 811. The deposition of a witness out of this state and in any other of the United States, a territory thereof, or the District of Columbia, may also be taken before a commissioner, appointed by the Governor of this state to take depositions in such other state, territory or district, upon giving to the adverse party eight days' notice of the time and place of examination, the name of the commissioner and the witness, if the distance of the place of examination from the place where the testimony is to be used do not exceed fifty miles, and one day in addition for every additional twenty-five miles.

Sec. 812. Either party may attend upon such examination, and examine the witness upon oral interrogatories, but if either party by written notice to the other, within three days from the service of the original notice, require it, it shall be taken upon written interrogatories, to be settled, if not agreed upon, by the same officer, and in the same manner as in case of deposition upon commission; and in such case the deposition shall be taken, certified and directed by the commissioner in the same manner, as a deposition upon commission.

TITLE VII.

Manner of taking depositions in the state.

Sec. 813. Deposition in the state, when taken, and notice thereof.
814. How taken, either party may attend.
815. Certificate of officer.
816 Deposition how and to whom delivered or forwarded.
817. Once taken, may be used by either party. Objections to relevancy or form.
818. Deposition under subdivisions 2, 3, or 4, proof before used. When taken upon insufficient notice.
819. Once taken may be read at any time. Exclusion of any portion of deposition.

Sec. 813. Either party may take the testimony of a witness in this state by deposition, in the cases allowed by this code, before a clerk of a court of record or other person authorized to administer oaths, on giving the adverse party, previous notice of the time and place of examination, the name of the officer and the witness. Such notice shall be at least three days, if the distance of the place [of] examination from the residence of the person to whom the notice is given, do not exceed twenty-five miles, and one day in addition for every additional twenty-five miles, unless the court or judge thereof by order prescribed a shorter time. When a shorter time is prescribed, the order shall be served with the notice.

Sec. 814. Either party may attend upon such examination and examine the witness upon oral interrogatories. The deposition shall be written by the officer taking the same, or by the witness, or by some disinterested person in the presence and under the direction of such officer. When completed it shall be read to, or by the witness, and subscribed by him. Before subscribing it, the witness shall be allowed, if he desire it, to correct or explain any statement in the deposition, but such statement although corrected and explained, shall remain a part of the deposition.

Sec. 815. The officer taking the deposition shall append thereto his certificate, under his seal of office, if there be a seal, to the effect, that the deposition was taken before him, at a place mentioned, between certain hours of a day or days mentioned, and reduced to writing by a person therein named. That before proceeding to the examination the witness was duly sworn to tell the truth, the whole truth and nothing but the truth, that the deposition was read to or by the witness, and then by him subscribed.

SEC. 816. The officer taking the deposition shall enclose the same in a sealed envelope, directed to the clerk of the court or justice of the peace before whom the action suit or proceeding is pending, or such other person as may by writing be agreed upon, and deliver or forward the same accordingly by mail or other usual channel of conveyance.

SEC. 817. A deposition taken pursuant to the provisions of this chapter may be used by either party upon the trial or proceeding, against any party giving or receiving the notice, subject to all legal exceptions. But no objections can be made at the trial to the relevancy of the testimony or the form of the interrogatory, unless the same appears by the deposition or written interrogatories to have been taken at the time of the examination or the settling of such interrogatories. Section 814, except the first sentence thereof, and sections 815 and 816 shall apply to depositions taken out of the State upon oral interrogatories.

SEC. 818. If a deposition be taken under the 2, 3 or 4, subdivisions of section 804, before the same can be used, proof shall be made that the witness did reside beyond the service of a supbœna, or that he still continues absent or infirm, as the case may be. A deposition taken, whether in the state or without, upon insufficient notice or otherwise not substantially in conformity with the provisions of this chapter may be excluded from the case unless such insufficient notice, or other omission has been waived by the consent or conduct of the adverse party.

SEC. 819. When a deposition has been once taken, it may be read in any stage of the same action, suit or proceeding or in any other action, suit or proceeding between the same parties, or their representatives upon the same subject and is then to be deemed the evidence of the party reading it. When any portion of a deposition is excluded from a case, so much of the adverse examination as relates thereto, is excluded also.

TITLE VIII.

General rules of examination.

Sec. 820. Order of proof, how regulated.
821. Witnesses not under examination, may be excluded
822. Interpreter sworn, when.
823. Court may control mode of interrogation.
824. Direct and cross-examination defined.
825. Leading questions defined.
826. When witness may testify or refresh his memory from writing.
827. Cross-examination, as to what it extends.
828. Party producing witness not allowed to impeach his credit, by evidence of bad character.
829. Witness, how re-examined, when once examined.
830. How witness impeached.
831. Same subject.
832. Evidence of good character, when allowed.
833. Writing shown to witness, may be inspected by adverse party.
834. Judge or juror may be called as a witness.

Sec. 820. The order of proof shall be regulated by the sound discretion of the court. Ordinarily the party, beginning the case, shall exhaust his evidence before the other begins.

Sec. 821. If either party require it, the judge may exclude from the court room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses.

Sec. 822. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him.

Sec. 823. The court may exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth, as may be, but subject to this rule, the parties may put such legal and pertinent questions as they see fit. The court, however, may stop the production of further evidence, upon any particular point, when the evidence upon it is already so full as to preclude reasonable doubt.

Sec. 824. The examination of a witness by the party producing him, is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination, must be completed before the cross-examination begins, unless the court otherwise direct.

Sec. 825. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, unless merely formal or preliminary, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it.

Sec. 826. A witness is allowed to refresh his memory, respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in either case the writing must be produced, and may be inspected by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also, a witness may testify from such a writing, though he retain no recollection of the particular facts; but such evidence shall be received with caution.

Sec. 827. The adverse party may cross-examine the witness, as to any matter stated in his direct examination, or connected therewith, and in so doing, may put leading questions, but if he examine him, as to other matters, such examination is to be subject to the same rules as a direct examination.

Sec. 828. The party producing a witness, is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 830.

Sec. 829. A witness once examined, shall not be re-examined as to the same matter, without leave of the court; but he may be re-examined as to any new matter, upon which he has been examined by the adverse party. After the examinations on both sides are concluded, the witness shall not be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

Sec. 830. A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts; except that it may be shewn by the examination of the witness, or the record of the judgment, that he has been convicted of a crime.

Sec. 831. A witness may also be impeached, by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing, they shall be shown to the witness, before any question is put to him concerning them.

Sec. 832. Evidence of the good character of a party, is not admissible in a civil action, suit or proceeding, unless the issue therein involve his character, nor of a witness in any action, suit or proceeding until the character of such witness has been impeached.

Sec. 833. Whenever a writing is shewn to a witness it may be inspected by the adverse party, and if proved by the witness, shall be read to the jury before his testimony is closed, or it shall not be read, except on recalling the witness.

Sec. 834. The judge himself or any juror may be called as a witness by either party, but in the former case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge.

TITLE IX.

Of the effect of evidence.

Sec. 835. Jury, judges of the effect of evidence, to be instructed on certain points.

Sec. 835. The jury subject to the control of the court in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are however to be instructed by the court, on all proper occasions:

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.
2. That they are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds;
3. That a witness, false in one part of his testimony, is to be distrusted in others;

4. That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution;

5. That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence; that in criminal cases, guilt shall shall be established beyond reasonable doubt.

6. That evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict, and therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

TITLE X.

Of the rights and duties of witnesses.

Sec. 836. Witness bound to attend when subpœnaed.
837. What questions witness bound to answer.
838. Right of witness to protection.
839. When witness protected from arrest.
840. To make affidavit if arrested.
841. Court may discharge witness from arrest.

Sec. 836. It is the duty of a witness, duly served with a subpœna, to attend at the time appointed, with any papers, books, documents, or other thing under his control, required by the subpœna, to answer all pertinent and legal questions, and unless sooner discharged, to remain till the testimony is closed. But a witness at the end of each day's attendance, may demand of the party or his attorney the payment of his legal fees for the next following day, and if not then paid, he is not obliged to remain longer in attendance.

Sec. 837. A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself. But he need not give an answer, which will have a direct tendency to subject him to punishment for a felony, or to degrade his character, unless, in the latter case, it be as to the very fact in issue, or to a fact from which the fact in issue would be presumed. This privilege is the privilege of the witness, and the objection cannot be made by a party or his attorney; but a witness must answer as to the fact of his previous conviction for felony.

Sec. 838. It is the right of a witness to be protected from irrelevant, insulting or improper questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

SEC. 839. Every person who has been in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee or other officer, is exonerated from arrest, in a civil case, while going to the place of attendance, necessarily remaining there, and returning therefrom. The arrest of a witness contrary to this section is void, and when wilfully made is a contempt of the court; and the officer making it, is responsible to the witness arrested, for double the amount of the damages which may be assessed against him therefor, and is also liable to an action at the suit of the party serving the witness with the subpœna, for the damages sustained by him in consequence of the arrest.

SEC. 840. But the officer making the arrest is not liable in any way therefor, unless the person claiming the exemption make, if required, an affidavit, stating:

1. That he has been served with a subpœna, to attend as a witness before a court, judge or other officer, specifying the same, the place of attendance, and the action, suit, or proceeding in which the subpœna was issued; and,
2. That he has not been thus served by his own procurement, with the intention of avoiding an arrest.

The affidavit may be taken by the officer, and exonerates him from liability for not making the arrest or for discharging the witness when arrested.

SEC. 841. The court, judge or officer, before whom the attendance of the witness is required, may discharge a witness from an arrest made in violation of section 839.

CHAPTER X.

TITLE I.—*Evidence in particular cases.*
TITLE II.—*Proceedings to perpetuate testimony.*
TITLE III.—*Oaths and affirmations.*

TITLE I.

Evidence in particular cases.

SEC. 842. An offer in writing equivalent to tender.
843. Whoever pays or delivers, entitled to receipt.
844. Objections to tender must be specified.
845. Rules for construing description of real property.
846. Offer of compromise not an admission, but particular facts admitted may be shown.
847. Confession of adultery in suit for dissolution of marriage contract.

SEC. 842. An offer in writing, to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production, and tender of the money, instrument or property.

SEC. 843. Whoever pays money or delivers an instrument or property, is entitled to a receipt therefor, from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

SEC. 844. The person to whom a tender is made, shall at the time specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterwards.

SEC. 845. The following are the rules, for construing the descriptive part of a conveyance of real property, when the construction is doubtful, and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others, which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be

construed by such particulars, if they constitute a sufficient description, to ascertain its application.

2. When permanent and visible, or ascertained boundaries or monuments, are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount;

3. Between different measurements, which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both;

4. When a road or a stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road, or the thread of the stream, are included in the conveyance, except where the road or bed of the stream is held under another title;

5. When tide water is the boundary, the rights of the grantor to low water mark are included in the conveyance, and also the right of this state between high and low water mark;

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them, if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite, and ascertained particulars.

Sec. 846. An offer of compromise is not an admission that anything is due, but admissions of particular facts, made in negotiation for compromise, may be proved, unless otherwise specially agreed at the time.

Sec. 847. In a suit for the dissolution of the marriage contract on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a decree of dissolution.

TITLE II.

Proceedings to perpetuate testimony.

Sec. 848 Evidence may be perpetuated.
849. Order for examination, how obtained.
850. Service of the order and notice, in case of non residents, by whom taken.
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855. Power and duty of the officer taking the deposition.

Sec. 848. The testimony of a witness may be taken conditionally and perpetuated, as provided in this title.

Sec. 849. The order for taking the testimony may be made by any judge of the circuit or supreme courts upon the application of the party desiring it, when it appears from the petition of such party verified as a complaint:

1. That the applicant is a party or expects to be a party to an action, suit or proceeding in a court in this state, or that he has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such an action, suit or proceeding;

2. That the testimony of a witness, whose name and place of residence is stated, is material to the prosecution or defence as the case may be, of such action, suit or proceeding, or possible controversy, and generally the question involved therein, and the facts expected to be proved by the witness

3. The names and residence of the adverse parties or persons adversely interested, so far as the applicant knows or can ascertain them.

The judge may thereupon in his discretion make an order, allowing the examination, prescribing therein the place thereof, and how long before the examination the order and notice of the time and place therefor shall be served.

SEC. 850. If it appear that the adverse parties or persons adversely interested or any of them reside out of the state or are unknown, the judge shall direct, that as to such parties or persons, service of the order and notice shall be made by publication, in the same manner as a summons. Upon proof of the service, the deposition may be taken conditionally, by the judge who made the order of examination, or by any other officer or person therein designated.

SEC. 851. Every interrogatory or answer or declaration of the witness shall be taken down, unless the parties otherwise agree. The deposition, when completed, shall be carefully read to, and subscribed by the witness, and then certified by the judge or other officer or person taking the same, and immediately thereafter filed in the office of the clerk of the county where it was taken together with the order for the examination of the witness, the petition on which the same was granted, the notice, and the proof of service of the order and notice.

SEC. 852. The papers filed with the deposition as required by the last section, or certified copy thereof, are primary evidence of the facts stated therein, to show compliance with the provisions of this title.

SEC. 853. If thereafter a trial be had, between the persons named in the petition as parties actual, expectant, or possible, or their representatives or successors in interest, upon proof of the death or insanity of the witness, or that he is beyond the state and his residence unknown, or of his inability to attend the trial by reason of age, sickness, or settled infirmity, the deposition or a certified copy thereof, may be given in evidence by either party, but in a trial in a suit in equity it may be given in evidence without such proof.

Sec. 854. The deposition so taken, when produced in evidence may be objected to as if it was the oral testimony of the witness; except that the form of the interrogatory shall not be objected to.

Sec. 855. The judge, officer or other person taking the deposition, shall control the examination, to the end that the whole truth may be declared by the witness, and if no one appears other than the applicant, he shall prevent leading and suggestive interrogatories by such applicant, except when the same may be necessary or merely formal, and shall himself cross examine the witness, concluding with the general interrogatory to the effect, whether the witness knows anything further in relation to the matter which would be of benefit to either party.

TITLE III.

Oaths and affirmations.

Sec. 856. Who authorized to take testimony and administer oaths.
857. Form of oath, usual.
858. Form may be varied to suit witness' belief.
859. Same subject
860. Who may affirm.

Sec. 856. Every court, judge, clerk of a court, justice of the peace or notary public is authorized to take testimony in any action, suit or proceeding, and such other persons in particular cases as this code elsewhere authorizes. Every such court or officer is authorized to administer oaths and affirmations generally, and every such other person in the particular case authorized.

Sec. 857. An oath may be administered as follows: The person, who swears, holds up his hand while the person administering the oath, thus addresses him: "You do solemnly swear that the evidence you shall give in the issue [or matter] now pending between ———

and ———— shall be the truth, the whole truth, and nothing but the truth, so help you God;" if the oath be administered to any other than a witness, the same form and manner may be used.

Sec. 858. Whenever the court or officer before which a person is offered as a witness, is satisfied that he has a peculiar mode of swearing, connected with or in addititition to the usual form of administration which, in his opinion, is more solemn or obligatory, the court or officer may, in its discretion, adopt that mode.

Sec. 859. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

Sec. 860. Any person who has conscientious scruples against taking an oath may make his solemn affirmation, by assenting, when addressed, in the following manner: "You do solemnly affirm that," &c., as in section 857.

Sec. 861. Whenever, by any provision of this code, an oath is required, an affirmation as prescribed in the last section, is to be deemed equivalent thereto, and a false affirmation is to be deemed perjury, equally with a false oath.

CHAPTER XI.

TITLE I.—*The supreme court.*
TITLE II.—*The circuit courts.*
TITLE III.—*The county courts.*
TITLE IV.—*Justices courts.*
TITLE V.—*Incidental powers and duties of the courts of justice and the judicial officers thereof.*
TITLE VI.—*Seals of the courts of justice.*
TITLE VII.—*Miscellaneous provisions, respecting courts and judicial officers.*

TITLE I.

The supreme court.

SEC. 862. Organization and jurisdiction of, number of judges to do business
863. Appointment of its officers, mode of payment.

SEC. 862. The supreme court is created and organized, and its jurisdiction limited and defined, by the organic law of the state, Art. VII., Con. The mode of bringing a cause into this court, and the mode of proceeding therein, is elsewhere provided in this code. The presence of a majority of all the judges of the court is necessary for the transaction of any business therein, but any less number may meet and adjourn from day to day or for the term with the same effect as if all were present.

SEC. 863. The court in term or a majority of the judges thereof in vacation, shall appoint a clerk of the court, who shall hold his office during the pleasure of such court or judges. The executive officer of the court is the sheriff for the time being of the county, in which the court is being held. The court may appoint a crier and such number of bailiffs for the term as may be necessary. The legal fees of such clerk, sheriff, crier and bailiffs for attendance on the court, shall be ascertained by the court, and directed to be paid by an order of the court. The amount of such fees so ascertained and ordered are payable out of the state treasury, and it is the duty of the proper officer on the presentation of a certified copy of such order, to draw his warrant on such treasury therefor.

TITLE II.

The circuit courts.

SEC. 864. Organization and jurisdiction of.
865. When term appointed by judge, manner and effect of.
866. Appointment of its officers, and mode of payment.

SEC. 864. The circuit courts are created and organized and their several jurisdictions limited and defined by the organic law of the state, Art. VII., Con. The terms of the court are either those appointed by law, or others, appointed by the judge of the court.

SEC. 865. When a term of the court is appointed by a judge, it shall be done by a general order to that effect, made and entered in the journal during term time, or by a special order, made and filed in vacation, for the trial of a particular cause or the transaction of certain business therein specified; a certified copy of which latter order, shall be served on the parties to the cause or business specified, ten days prior to such term. In the former case, at the court so appointed, any business may be transacted, as if the same were a term appointed by law, but in the latter case only such as may be specified in the order.

SEC. 866. Each circuit court has the power to appoint a crier and such number of bailiffs as may be necessary for the term. The legal fees of such crier, bailiffs or other officer of the court for attendance thereon, shall be ascertained by the court and directed to be paid by an order thereof, and not otherwise. Upon the presentation of a certified copy of such order to the proper officer of the county wherein such court is holden, it shall be the duty of such officer to draw his warrant on the treasurer of such county, for the amount therein specified.

TITLE III.

The county courts.

SEC. 867. Organization and jurisdiction of.
868. Actions at law, jurisdiction of.

SEC. 869. Probate matters, jurisdiction of.
870. County business, authority and power to transact.
871. In judicial proceedings by or against the county, the county is represented by the county court.
872. When holden, how terms appointed by court or judge.
873. When business continued on account of equal division of the court.
874. Appointment and payment of its officers
875. When cause removed by appeal from county court, and when by review.
876. Order of docketing and disposition of business.
877. For what business court always open.
878. Has such other jurisdiction or authority, as may be expressly given.

SEC. 867. The county court is created by the organic law of the state, Art. VII., Con., and its organization is provided for, and its jurisdiction limited and defined by such organic law, and the provisions of this title. The court is held by the county judge, except when county business is being transacted therein, and then it is held by such judge and two commissioners designated by law, or a majority of such persons.

SEC. 868. The county court has jurisdiction, but not exclusive, of actions at law and all proceedings therein, and connected therewith, where the claim or subject of the controversy does not exceed the value of five hundred dollars, and exclusive jurisdiction of actions for forcible entry and detainer, without reference to the value of the property.

SEC. 869. The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is,

1. To take proof of wills;

2. To grant and revoke letters testamentary, of administration, and of guardianship;

3. To direct and control the conduct, and settle the accounts of executors, administrators and guardians;

4. To direct the payment of debts and legacies, and the distribution of the estates of intestates;

5. To order the sale and disposal of the real and personal property of deceased persons;

6. To order the renting, sale or other disposal of the real and personal property of minors;

7. To take the care and custody of the person and estate of a lunatic or habitual drunkard, and to appoint and remove guardians therefor, to direct and control the conduct of such guardians, and settle their accounts.

8. To direct the admeasurement of dower.

SEC. 870. The county court has the authority and powers pertaining to county commissioners, to transact county business; that is,

1. To provide for the erection and repairing of court houses, jails, and other necessary public buildings for the use of the county;

2. To provide offices and furniture, books, stationery, fuel and light therefor, for the sheriff, county clerk and treasurer, or other county officers;

3. To establish, vacate, or alter county roads or highways within the county, or any other necessary act relating thereto, in the manner provided by law;

4. To provide for the erection and repairing within the county, of public bridges upon any road or highway, established by public authority;

5. To license ferries, and fix the rates of ferriage;

6. To grant grocery and all other licenses authorized by law; where the authority to do so, is not expressly given to some other tribunal;

7. To estimate and determine the amount of revenue to be raised for county purposes, and to levy the rate necessary therefor, together with the rate required by law for any other purpose, and cause the same to be placed in the hands of the proper officer for collection;

8. To provide for the maintainance and employment of the county or transient paupers, in the manner provided by law;

9. To have the general care and management of the county property, funds and business, where the law does not otherwise expressly provide;

10. To compound for or release in whole or in part any debt or damages arising out of contract due the county, and for the sole use thereof, upon such terms as may be just and equitable.

SEC. 871. All actions, suits or proceedings by or against a county, are in the name of such county, but the county is represented by the county court, and such court has authority and power to control and direct the proceeding therein as if it were plaintiff or defendant as the case may be.

SEC. 872. The county court is held at such times as may be appointed by law, and at such other times as the court in term or the county judge in vacation may appoint, in like manner and with like effect as the circuit court or judge thereof is authorized by section 865.

SEC. 873. When in the transaction of county business, only two of the persons authorized to hold the court are present, and there shall be a disagreement between them upon any question or matter before them, the same shall be continued until the next term, or until the third person authorized to sit, is present.

SEC. 874. The county court has the same power and authority to appoint a crier and bailiffs as the circuit court, and shall ascertain and order the payment of their legal fees therefor in like manner and with like effect.

SEC. 875. The provisions of title IV. of chapter VI. relating to appeals are intended to apply to judgments and decrees of the county court in all cases, but not to its decisions given or made in the transaction of county business. In the latter case, the decisions of the court shall only be reviewed upon the writ of review provided by this code.

SEC. 876. The business of the court at each term shall be docketed and disposed of in the following order:

1. Cases at law, including motions or other proceedings connected therewith;
2. The business pertaining to a court of probate as defined and specified in section 869;
3. County business.

The proceedings and records of the court, pertaining to or concerning the three classifications of business specified in subdivisions of this section, shall be entered and kept in separate books.

SEC. 877. The court is always open for the transaction of the business mentioned in subdivision 2 of the last section, whenever the particular proceeding or transaction is authorized to be had or done without the presence of, or notice to, another.

SEC. 878. In addition to the jurisdiction, authority, or power specified in this title, the county court, or judge thereof, has such other jurisdiction, authority and power, as is elsewhere expressly given to it or him by this code, or other statute.

TITLE IV.

Justices court.

SEC. 879. Justices court, definition of, and where and by whom holden.
880. Mode of proceeding and rules of evidence in.
881. Jurisdiction of justices' court.
882. Same subject.
883. Where action may be commenced.

SEC. 879. A justice's court, is a court held by a justice of the peace, within the precinct for which he may be chosen. There are no particular terms of such court, but the same is always open for the transaction of business, according to the mode of proceeding prescribed for it.

SEC. 880. The mode of proceeding and the rules of evidence are the same in a justice's court, as in a like action or proceeding in a court of record, except where otherwise specially provided.

SEC. 881. A justice's court has jurisdiction, but not exclusive of the following actions:

1. For the recovery of money or damages only, when the amount claimed does not exceed two hundred and fifty dollars;
2. For the recovery of specific personal property, when the value of the property claimed and the damages for the detention, do not exceed two hundred and fifty dollars;
3. For the recovery of any penalty or forfeiture, whether given by statute, or arising out of contract, not exceeding two hundred and fifty dollars;
4. Also, to give judgment without action, upon the confession of the defendant for any of the causes specified in this section, except for a penalty or forfeiture imposed by statute.

SEC. 882. The jurisdiction conferred by the last section, does not extend, however,

1. To an action in which the title to real property shall come in question;
2. To an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction, or upon a promise to marry.

SEC. 883. In an action to recover a penalty or forfeiture given by statute, the cause of action or some part thereof, must have arisen within the county where the action is commenced, or upon a lake, river or other water bordering upon such county and opposite thereto; but otherwise than this, the jurisdiction of a justice's court does not depend upon where the cause arose, provided the defendants or either of them reside in the precinct where the action is commenced, or be found therein at the commencement thereof, and if neither of them reside in the state, the action may be commenced in any precinct in the state.

TITLE V.

Incidental powers and duties of the courts of justice and the judicial officers thereof.

Sec. 884. Powers of courts respecting the conduct of judicial proceedings.
885. How exercised
886. Judicial officer, definition, when disqualified to act.
887. Judicial officer not to act as attorney, except.
888. Powers of judge out of court.
889. Subsequent application to another judge, when prohibited.
890. Power of judicial officers, respecting the conduct of proceedings before them.
891. How exercised.
892. Power of judicial officers to take and certify proof, or acknowledgments, affidavits or depositions.
893. Same subject.

Sec. 884. Every court of justice has power:

1. To preserve and enforce order in its immediate presence;

2. To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority;

3. To provide for the orderly conduct of proceedings before it, or its officers;

4. To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of a court, in an action, suit or proceeding pending therein;

5. To control, in futherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto:

6. To compel the attendance of persons, to testify, in an action, suit or proceeding pending therein, in the cases and manner provided by this code;

7. To administer oaths in an action, suit or proceeding pending therein, and in all other cases, where it may be necessary in the exercise of its powers, or the performance of its duties.

SEC. 885. For the effectual exercise of the powers specified in the last section, the court may punish for contempt in the cases and the manner provided in this code.

SEC. 886. A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such, in a court of which he is a member in any of the following cases:

1. In an action, suit or proceeding to which he is a party, or in which he is directly interested;
2. When he was not present and sitting as a member of the court, at the hearing of a matter submitted for its decision;
3. When he is related to either party, by consanguinity or affinity within the third degree;
4. When he has been attorney in the action, suit or proceeding in question for either party.

But this section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the cases specified in subdivisions 3 and 4, the disqualification may be waived by the parties, and except in the supreme court, shall be deemed to be waived, unless an application for a change of the place of trial be made as provided in this code.

SEC. 887. Any judicial officer may act as an attorney in any action, suit or proceeding to which he is a party, or in which he is directly interested. A judge of the county court or justice of the peace otherwise authorized by law, may act as an attorney, in any court, other than the one of which he is judge, except in an action, suit or proceeding removed therefrom to another court for review; but no judicial officer shall act as attorney in any court, or otherwise, other than as in this section allowed.

SEC. 888. A judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from a court, and not otherwise.

SEC. 889. If an application for an order, made to a judge of the court in which the action, suit or proceeding is pending, be refused in whole or in part, or be granted conditionally, no subsequent application for the same order shall be made to any other judge. A violation of this section is punishable as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by the court or judge thereof in which the action, suit or proceeding is pending.

SEC. 890. Every judicial officer has power:

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of a duty imposed upon him by this code or other statute;

2. To compel obedience to his lawful orders, as provided in this code;

3. To compel the attendance of persons to testify in a proceeding pending before him in the cases and manner provided in this code;

4. To administer oaths to persons, in a proceeding pending before him, and in all other cases where it may be necessary, in the exercise of his powers and the performance of his duties.

SEC. 891. For the effectual exercise of the powers specified in the last section, a judicial officer may punish for contempt, in the cases and manner provided in this code.

SEC. 892. The judges of the supreme court and circuit courts have power in any part of the state, to take and certify:

1. The proof and acknowledgment of a conveyance of real property, or any other written instrument authorized or required to be proved or acknowledged;

2. The acknowledgment of satisfaction of a judgment in any court;

3. An affidavit or deposition, to be used in any court of justice or other tribunal of this state;

4. To exercise any other power, and perform any other duty conferred or imposed upon them by this code or other statutes.

SEC. 893. Every other judicial officer may, within the county, city, district or precinct, in which he is chosen,

1. Exercise the powers mentioned in the first three subdivisions of the last section;

2. Exercise any other power, and perform any other duty conferred or imposed upon him by this code, or other statutes.

TITLE VI.

Seals of the courts of justice.

SEC. 894. What courts have seals.
895. How long present seals to continue.
896. Secretary of state to procure new seals, devices thereof.
897. Clerk to keep seal, and affix it when required.

SEC. 894. Each of the following courts, and no other, has a seal:

1. The supreme court;
2. Each circuit court;
3. Each county court.

SEC. 895. The seals now used by these courts shall continue to be so used until and including the first day of May, A. D. 1863. After that day the seals devised as provided in the next section, shall be the seals thereof.

SEC. 896. At least thirty days before the first day of May, A. D. 1863, the secretary of state shall procure and transmit, at the expense of the state, to the clerks of the several courts mentioned in section 894, seals, with the arms of the state engraved in the center thereof, and with the following inscription surrounding the same:

1. For the supreme court, "Supreme Court, State of Oregon."
2. For the circuit court, "Circuit Court, —— County, State of Oregon," inserting the name of the particular county;
3. For the county court, "County Court, —— County, State of Oregon," inserting the name of the particular county.

SEC. 897. The clerk of each court mentioned in section 894, shall keep the seal thereof, and affix it to any process, transcript, certificate or other paper required by this code or other statute.

TITLE VII.

Miscellaneous provisions, respecting courts and judicial officers.

SEC 898. Sittings of courts to be public, when may be private.
899. Courts not to be open on certain days, except for special purposes.
900 If court appointed or adjourned to such day, to be deemed for the next judicial day.
901. Courts where to be held.
902. When trial may be had elsewhere than at courthouse.
903. When and how judge may change the place of holding court.
904. When court may order sheriff to provide accommodations for court and jury.
905. Persons bound to appear at the place appointed by judge.
906. When judge does not attend, how court adjourned.
907. Proceeding not affected by failure of term, or vacancy in office.
908. Application to court or judge how addressed.
909. Proceedings to be in English.
910. Power of court or judge to adjourn judicial proceedings.
911. Means to be used by court to execute its powers.

SEC. 898. The sittings of every court of justice are public, except as provided in this section. Upon the agreement of the parties to a civil action, suit or proceeding filed with the clerk, or entered upon the journal, the court may direct the trial of an issue of law or fact, or any other proceeding therein, to be private; and upon such order being made, all persons shall be excluded, except the officers of the court, the parties, their witnesses and counsel.

SEC. 899. The courts of justice may be held, and judicial business may be transacted, on any day, except as provided in this section. No court can be opened, nor can any judicial business be transacted on Sunday, on the first day of January, on the fourth day of July, on Christmas day, on a day on which a general election is held, or on a day appointed by the executive authority of the United States, or of this state, as a day of fast or thanksgiving, except for the following purposes:

1. To give instructions to a jury, then deliberating on their verdict;
2. To receive a verdict, or discharge a jury;
3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

SEC. 900. If any of the days mentioned in the last section, happen to be a day appointed for holding a court, or to which it is adjourned, it is deemed appointed for, or adjourned to the next judicial day.

SEC. 901. Every court of justice shall sit at the place designated by law, for that purpose, except as provided in the next two sections.

SEC. 902. Upon the agreement of the parties to a civil action, suit or proceeding, filed with the clerk, or entered upon the journal, the court may direct that the trial of an issue of law or of fact, or any other proceeding therein, be had elsewhere within the county than at the court house.

SEC. 903. A judge authorized to hold or preside at a court, may by an order filed with the clerk thereof, and published as he may prescribe, direct that the court be held or continued at any other place in the county than that appointed, when war, pestilence, or other public calamity, or the danger thereof, may render it necessary; and may, in the same manner, revoke the order, and in his discretion appoint another place in the same county for holding the court.

SEC. 904. If the proper authority neglects to provide any court with rooms, furniture, fuel, lights and stationery, suitable and sufficient for the transaction of its business, and for the jury attending upon it, if there be one, the court may order the sheriff to do so, at the place within the county designated by law for holding such court; and the expense incurred by the sheriff in carrying such order into effect, when ascertained and ordered to be paid by the court, is a charge upon the county.

SEC. 905. When a court is held at a place appointed as provided by section 903, every person held or required to appear at the court, shall appear at the place so appointed.

SEC. 906. If no judge attend on the day appointed for holding a court, before four o'clock in the afternoon, the court shall stand adjourned until the next day at nine o'clock; and if no judge attend on that day, before four o'clock in the afternoon, it shall then stand adjourned for the term.

SEC. 907. No proceeding in a court of justice in any action, suit or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges, or by the failure of a term thereof.

SEC. 908. An application or other proceeding addressed to a court, shall be addressed to it by its style, as given in this code; an application or other proceeding addressed to a judicial officer shall be addressed to him by his name, without any other title than his style of office.

SEC. 909. Every writing in any action, suit or proceeding whatever, in a court of justice of this state, or before a judicial officer, shall be in the English language; but such abbreviations as are now commonly used in that language, may be used, and numbers may be expressed by figures or numerals, in the customary manner.

SEC. 910. A court or judicial officer has power to adjourn any proceeding before it or him, from time to time as may be necessary, unless otherwise expressly provided by this code.

SEC. 911. When jurisdiction is, by the organic law of this state, or by this code or any other statute, conferred on a court or judicial officer, all the means to carry into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code, any suitable process or mode of proceeding may be adopted, which may appear most conformable to the spirit of this code.

CHAPTER XII.

Of persons specially invested with powers of a judicial nature.

TITLE I.—*Juries, and the qualifications and exemption of jurors.*
TITLE II.—*Manner of forming jury list.*
TITLE III.—*Manner of drawing and summoning jury.*
TITLE IV.—*Referees.*
TITLE V.—*Commissioners to take affidavits, and the proof and acknowledgment of deeds, out of this state.*

TITLE I.

Juries, and the qualification and exemption of jurors.

SEC 912. Jury, definition of.
913. Different kinds of juries.
914. Grand jury, definition of.
915. Trial jury, definition of.
916. Jury of inquest, definition of.
917. Other juries abolished, number of jury necessary to concur in verdict or indictment.
918. Who are competent to act as jurors.
919. Who are exempt
920. Who may be excused.

SEC. 912. A jury is a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power:

1. To present or indict a person for a public offence; or
2. To try a question of fact.

SEC. 913. A jury is of three kinds:

1. A grand jury;
2. A trial jury;
3. A jury of inquest.

SEC. 914. A grand jury is a body of men, seven in number, drawn by lot from the jurors in attendance upon the court at the particular term, and sworn to inquire of public offences, committed or triable within the county.

SEC. 915. A trial jury is a body of men, twelve in number, in the circuit court, and six in number in the county court, and courts of justice of the peace, drawn by lot from the jurors in attendance upon the court at a particular term, and sworn to try and determine a question of fact; but in a justice's court the jury is drawn according to the mode specially provided for such court.

SEC. 916. A jury of inquest is a body of men, six in number, summoned from the qualified inhabitants of a particular district, before the sheriff, coroner, or other ministerial officer, to inquire of particular facts.

SEC. 917. All other juries than those herein described, are abolished. A grand jury may present or indict a person, with a concurrence of five of their number, and not otherwise. The verdict of a trial jury shall be unanimous, but the verdict of a jury of inquest is sufficient if two-thirds of the jurors concur therein.

SEC. 918. A person is not competent to act as a juror unless he be:

1. A citizen of the United States;
2. A white male inhabitant of the county in which he is returned, and who has been an inhabitant thereof for the year next preceding the time he is drawn or called;
3. Over twenty-one years of age;
4. In the possession of his natural faculties and of sound mind.

Nor is any person competent to act as a juror who has been convicted of any felony, or a misdemeanor involving moral turpitude.

SEC. 919. A person is exempt from liability to act as a juror, if he be:

1. A judicial officer, as defined in this code;
2. Any other civil officer of this state, or the United States, whose duties are at the time inconsistent with his attendance as a juror;
3. An attorney;
4. A minister of the gospel, or a priest of any denomination;
5. A teacher in a college, academy or school;
6. A practising physician;
7. An acting non-commissioned officer, musician or private of a military organization, duly enrolled in the service of the United States, or of this state;
8. An acting member of a company of firemen duly organized, and who has been such member for a period of six months next preceding the time when the exemption is claimed;

9. A person who has served, within this state, as an acting member of a company of firemen for the period of seven years;

10. Acting ferrymen or millers.

Sec. 920. A person may be excused from acting as a juror, when, for any reason, his interests or those of the public will be materially injured by his attendance; or when his own health, or the death or sickness of a member of his family, requires his absence; but no person shall be excused on account of the causes in this section mentioned unless it appear that after he was summoned he could not, by reasonable precaution, have provided against them.

TITLE II.

Manner of forming jury list.

Sec. 921. County court to make jury list annually.
922. Names to be selected only of those qualified and liable.
923. Number and distribution of names selected.
924. What jury list to contain, and where filed.
925. County clerk to deposit ballots in jury box.

Sec. 921. The county court of each county shall, at its first term of each year, or, in case of omission or neglect to do so, then at any following term, make from the last preceding assessment roll of the county, a list denominated, the jury list, containing the names of persons to serve as grand and trial jurors until the following year, or new lists be made.

Sec. 922. In preparing the jury list, the names of those persons only must be selected, who are known or believed to be possessed of the qualifications prescribed in section 918, and not entitled to exemption as provided in section 919.

Sec. 923. The jury list shall contain the names of two hundred persons, if there are that number of qualified jurors upon the assessment roll. They shall be selected from the different portions of the county, in proportion to the number qualified upon the assessment roll as much as practicable.

Sec. 924. The jury list shall contain the christian and surname, and the place of residence and occupation of each person named therein, and shall be certified by the clerk of the county court and placed on file in the office of the county clerk within ten days from the time it is prepared.

SEC. 925. The county clerk shall keep in his office a sufficient box carefully secured, which is denominated the jury box. On receiving the jury list, he shall destroy all ballots remaining in the box, and prepare and deposit in such box, separate ballots, containing the name place of residence and occupation of each person embraced in the list, and folded as nearly alike as practicable, and so that the name cannot be seen.

TITLE III.

Manner of drawing and summoning jury.

SEC. 926. Jurors to be drawn for circuit and county courts.
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928. Drawing, when and where to take place.
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930. Panel to be delivered to the sheriff.
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934. Ballots drawn, how disposed of.
935. Certificate of clerk respecting the attendance of jurors.
936. Juror not to be drawn twice until list exhausted.
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SEC. 926. The jurors for every term of the circuit and county court in the county shall be drawn from the names deposited in the jury box.

SEC. 927. For the circuit court, thirty-one names shall be drawn, from which number the grand and trial juries for the term are selected as elsewhere provided in this code. For the county court twelve names shall be drawn, from which number the trial juries for the term are selected in like manner.

SEC. 928. The drawing shall take place at the office of the county clerk not less than ten nor more than twenty days before the holding of the term of court at which the jurors are to serve; but if the term be one appointed by the court or judge thereof, the drawing may be at any shorter time before such term, as such court or judge may prescribe in the order appointing such term.

SEC. 929. Whenever jurors are to be drawn, the county clerk shall take to his assistance the sheriff or a justice of the peace for the county and proceed with the drawing as follows:

1. The clerk shall shake the box containing the ballots, so as to mingle them as much as possible;
2. He shall then publicly draw out of the box as many ballots as there are jurors required;

3. A minute of the drawing shall be kept, in which the name contained on each ballot drawn, shall be entered before another ballot can be drawn;

4. If, when the whole number of ballots required is drawn, it appear that a person, whose name is drawn, is dead, or resides out of the county, that fact shall be entered in the minute of the drawing, and the ballot containing the name destroyed;

5. Another ballot must then be drawn in place of that destroyed, and the name contained thereon shall in the same manner be entered in the minute of the drawing;

6. The same proceedings shall be had, as often as necessary, until the requisite number of ballots is drawn, exclusive of those appearing to be dead or non-resident;

7. The minute of the drawing shall then be signed by the clerk and the attending officer, and immediately filed in the office of the former.

SEC. 930. A panel of the names of the persons drawn as jurors, with their places of residence and occupation, and stating for what court, and the particular term thereof, they were drawn, shall then be made and certified by the clerk, and delivered without delay to the sheriff of the county.

SEC. 931. At least five days before the first day of the term, the sheriff shall summon the persons named in the panel delivered to him, to attend the court, by giving written notice to each of them personally or by leaving the same at his place of residence, with some person of suitable age and discretion.

SEC. 932. The sheriff shall return such panel to the court at its opening, specifying the persons summoned, and the manner in which each was notified, and the date thereof.

SEC. 933. The court to which the panel of jurors is returned by the sheriff, may impose a fine not exceeding twenty dollars, for each day a juror, without reasonable cause, neglects to attend. If, however, the notice to attend were not personally served, the fine shall not be imposed, until, upon an order to shew cause an opportunity is afforded him to be heard. The oath of the juror shall be received in his favor in any proceeding under this section.

SEC. 934. The county clerk shall preserve the ballots drawn as provided in section 929, until after the adjournment of the court, and shall then:

1. Destroy the ballots containing the names of those who were discharged, for want of a qualification mentioned in section 918, or by reason of an exemption mentioned in section 919;

2. Deposit in the jury box, the ballots containing the names of those who did not appear, or were discharged for any other reason than those mentioned in the last subdivision;

3. Deposit in a box to be denominated, the box of drawn jurors, the ballots containing the names of those who attended and served.

SEC. 935. The clerk of the court shall within one week after its adjournment make and file in the office of the county clerk a certified list of all the jurors returned to the court, specifying:

1. Those who were discharged for want of qualification, or by reason of exemption;

2. Those who did not appear or were discharged for any other reason;

3. Those who attended and served, and the per diem and mileage of each.

SEC. 936. Until the ballots in the jury box have all been drawn, including those returned, as provided in subdivision 2 of section 934, the ballots deposited in the box of drawn jurors, are not to be drawn from, but whenever the ballots in the jury box have all been drawn, and a new jury list has not been furnished, the ballots of drawn jurors shall all be returned to the jury box, and the jurors drawn therefrom as before, until a new list is furnished.

SEC. 937. Whenever for any reason, the number of jurors, either in whole or in part, required by this code, do not attend a term of court, the court has power to direct the sheriff to summon forthwith from the body of the county, persons having the qualifications of jurors, to serve as such, during the term.

TITLE IV.

Referees.

SEC. 938. Referee, definition of. | 939. Reference, definition of.

SEC. 938. A referee is a person appointed by the court, or a judicial officer, with power:

1. To try an issue of law or of fact in a civil action, suit or proceeding, and report thereon;

2. To ascertain any other fact in a civil action, suit or proceeding, when necessary for the information of the court, and report the fact, or to take and report the evidence in a suit in equity;

3. To execute an order, judgment or decree, or to exercise any other power or perform any other duty expressly authorized by this code.

SEC. 939. The appointment of a referee, is denominated a reference. The manner and occasion of making an order of reference are elsewhere provided for in this code.

TITLE V.

Commissioners to take affidavits, and the proof and acknowledgments of deeds, out of this state.

SEC. 940. How appointed, tenure of office, powers and duties.
941. Seal and oath of office, and where and when filed.

SEC. 940. The governor may appoint as many commissioners in each of the other states, or in a territory of the United States, or in the District of Columbia, as he may deem expedient, who shall hold their offices for four years, and may within the state, territory or district for which they are appointed, and not otherwise, take and certify:

1. The proof or acknowledgment of a conveyance of real property within this state, or of any other written instrument to be used or operate therein;

2. The acknowledgment of satisfaction of any judgment or decree of a court of this state;

3. An affidavit or deposition to be used in any court of justice, or before any judicial officer of this state; and,

4. To exercise any other power, and perform any other duty conferred or imposed upon them by this code or other statutes.

SEC. 941. A commissioner appointed under the last section shall, before he can exercise the powers therein conferred, provide himself with a seal of office, with the arms of this state engraved in the center thereof, and with the following inscription surrounding the same: "Commissioner for Oregon, ————;" the blank following the word

"Oregon," to be filled with the name of the state, territory or district for which such commissioner is appointed, and take and subscribe an oath before a judicial officer in the county, city or town where he resides, faithfully to perform the duties of the office of a commissioner to take affidavits, depositions, and the proof and acknowledgment of deeds out of this state, according to the laws thereof; and file such oath and an impression of such seal in the office of the secretary of this state.

CHAPTER XIII.

Of the ministerial officers of the courts of justice.

TITLE I.—*District attorneys.*
TITLE II.—*Clerks.*
TITLE III.—*Sheriffs.*
TITLE IV.—*Escapes, and the liabilities of sheriffs therefor.*
TITLE V.—*Assignment of the jail prisoners and process to a new sheriff.*
TITLE VI.—*Miscellaneous provisions respecting sheriffs and their officers.*
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TITLE I.

District attorneys.

SEC. 942. He is the public prosecutor.
943. Must attend courts and conduct prosecutions.
944. Duties as to proceedings before magistrates and grand jury.
945. To prosecute for penalties, and defend when state a party.
946. Duties in suit for divorce.
947. To deliver receipt for money received by him.
948. To file account with county treasurer.
949. Action against him for failure to pay over money.
950. When not to receive fee or act as attorney in civil action.
951. Shall keep a register and deliver it to his successor.
952. Annual report to secretary of state.
953 Court may appoint another in his absence.

SEC. 942. The district attorney in each district, is the public prosecutor therein.

SEC. 943. He shall attend the terms of all courts having jurisdiction of public offences within his district, and conduct, on behalf of the state, all prosecutions for such offences therein.

SEC. 944. He shall institute proceedings before magistrates, for the arrest of persons charged with, or reasonably suspected of public offences, when he has information that any such offence has been committed, and attend upon and advise the grand jury when required.

SEC. 945. He shall prosecute for all penalties and forfeitures to the state, which may be incurred in any county in his district, and for which no other mode of prosecution and collection, is expressly provided by statute, and in like case, prosecute or defend, as the case may be, all actions, suits or proceedings in any county in his district to which the state or such county may be a party.

SEC. 946. In any suit for the dissolution of the marriage contract, or to have the same declared void, the state is to be deemed a party defendant, and the party plaintiff in such suit shall cause the summons to be served upon the district attorney of the district within which the suit is commenced, at least ten days before the term at which the defendant is required to appear and answer. It shall be the duty of such district attorney, so far as may be necessary to prevent fraud or collusion in such suit, to control the proceedings on the part of the defence, and in case the defendant does not appear therein, or defend against the same in good faith, to make a defence therein on behalf of the state.

SEC. 947. When he receives money or property in his official capacity, he shall deliver a receipt therefor to the person from whom he receives it, and file a duplicate thereof with the treasurer of the county for which the same is received.

SEC. 948. He shall on or before the first Monday in January and July of each year, file in the office of the county treasurer of the proper county, an account in writing, verified by his own oath, of all money received by him in his official capacity, during the preceding half year, and shall at the same time pay it over to such county treasurer.

SEC. 949. If he refuse or neglect to account for and pay over money so received, as required by the last section, the county treasurer shall commence an action against him therefor, in the name of the county.

SEC. 950. He shall not receive any fee or reward from any private person for his services in any criminal action, nor during the pendency of such prosecution can he act as attorney for either party in any civil action, suit or proceeding involving substantially the same controversy.

SEC. 951. The district attorney must keep a register of his official business, in which he shall make a note of every action, suit or proceeding commenced or defended by him in his official capacity, and the proceedings therein. The register shall at the expiration of his term of office, be delivered by him to his successor in office.

SEC. 952. He shall on or before the first Monday in September of each year, file in the office of the secretary of state, a written report of the amount and kind of official business by him transacted during the preceding year; specifying therein the number of persons indicted for public offences, the number tried therefor, the result thereof, and the punishment awarded, together with such particular statements and suggestions as he may deem useful and interesting.

SEC. 953. If the district attorney fail to attend any court at which he is required to be, such court shall appoint another person to perform the duties of such attorney during his absence from the court, who shall receive the legal fees for the business which he may transact at such term, and a reasonable compensation for his attendance, to be paid from the county treasury, upon the order of the court.

TITLE II.

Clerks.

SEC. 954. Office of clerk of supreme court, where kept, and how furnished.
955. Office of county clerk, where kept.
956. Office hours.
957. Any clerk may have deputy, how appointed.
958. Cannot act or have a partner act as attorney of same court.
959. Duties of clerks.

SEC. 954. The office of the clerk of the supreme court is kept at the seat of government, in such building or room thereat, as such court may by order designate. The rent thereof, and the cost of such fuel, lights, books and stationery as may be necessary therefor, shall be ascertained and ordered to be paid by such court, from the treasury of the state, in the same manner as the compensation of the crier and bailiffs of such court is ascertained and paid.

SEC. 955. The office of the county clerk is kept in such building or room at the place appointed by law for holding the courts therein, as the county court may by order designate.

SEC. 956. Each clerk shall keep his office open for the transaction of business, as follows:

1. A county clerk, on every judicial day, from eight to twelve in the forenoon, and from one to five in the afternoon;
2. The clerk of the supreme court, as such court may by order direct.

SEC. 957. Each county clerk and the clerk of the supreme court may have a deputy, to be appointed by such clerk in writing, and to continue during his pleasure. Such deputy has the power to perform any act or duty relating to the clerk's office, that his principal has, and his principal is responsible for his conduct.

Sec. 958. Each county clerk is prohibited during his continuance in office, from acting, or having a partner who acts as an attorney of the court of which he is clerk.

Sec. 959. It is the duty of the clerk of the supreme court and each county clerk, for each of the courts of which he is clerk;

1. To keep the seal of the court, and affix it in all cases where he is required by law.
2. To record the proceedings of the court.
3. To keep the records, files and other books and papers appertaining to the court;
4. To file all papers delivered to him for that purpose, in any action, suit or proceeding in the court.
5. To attend the terms of the court of which he is clerk, to administer oaths, and receive the verdict of a jury, in any action, suit, or proceeding therein, in the presence and under the direction of the court;
6. To keep the journal of the proceedings of the court, at its terms, and under the direction of the court to enter its orders, judgments and decrees;
7. To authenticate, by certificate or transcript, as may be required, the records, files or proceeding of the court, or any other paper appertaining thereto, and filed with him;
8. To exercise the powers and perform the duties conferred and imposed upon him elsewhere by this code, or other statute.
9. In the performance of his duties, to conform to the direction of the court.

TITLE III.

Sheriffs.

Sec. 960. Office of, where kept, and office hours.
961. Service of papers on sheriff, how made at office.
962. May have deputy, how appointed.
963. Special appointment, how made, sheriff's responsibility.
964. When to furnish copy of process.
965. How to execute process
966. When he may command the power of the county.
967. Duty of persons commanded, and consequences of refusal.
968. Sheriff is executive officer of the county. His general duties.
969. County not responsible for his acts.

SEC. 960. The sheriff of each county shall keep an office in such room or building at the place appointed by law for holding courts therein, as the county court may by order designate. The sheriff's office shall be kept open on the days, and during the hours required for the county clerk's office to be so.

SEC. 961. Service of a paper upon the sheriff may be made by delivering it to a person belonging to and in the office during office hours, or if no such person be there, by leaving it in the office, or if the office be not open, by delivering it to the county clerk or his deputy at the county clerk's office. The service in the cases provided in this section, is equivalent to a personal service on the sheriff.

SEC. 962. A sheriff may have a deputy, to be appointed by him in writing, and to continue during his pleasure. A certified copy of the appointment of a deputy sheriff shall be filed with the county clerk; and the person appointed shall, before entering upon the duties of the office, take and file with the county clerk the oath of office.

SEC. 963. A sheriff may also by special written appointment, authorize any other person to do any particular act. A certified copy of such appointment shall be filed with the county clerk, unless indorsed upon the process, order or other paper, so authorized to be served or executed. A deputy has the power to perform any act or duty that his principal has, and a person specially appointed to do a particular act, has the same power in relation to the particular act authorized, and the principal is responsible for the conduct of such deputy or person specially appointed.

SEC. 964. When any process, order or paper is delivered to an officer, to be executed or served, he shall deliver to the person delivering it, if required, on payment of his fee, a written memorandum, specifying the names of the parties in the process, order or paper, the general nature thereof, and the day on which it was received. He shall also, when this code or other statute requires it, or upon the request of the party served, without fee, deliver to him a copy thereof.

SEC. 965. An officer to whom any process, order or paper is delivered, shall execute or serve it according to its command, or direction, or as required by this code or other statute, and must make a written return of the execution or service thereof.

SEC. 966. When an officer finds or has reason to apprehend, that resistance will be made to the execution or service of any process, order or paper, delivered to him for execution or service, and authorized by this code, or other statute; he may command as many male inhabitants of his county as he may think proper and necessary, and any military company or companies in the county, armed and equipped, to assist him in overcoming the resistance, and if necessary in seizing, arresting and confining the resisters and their aiders and abettors, to be punished according to law.

SEC. 967. Every person commanded by an officer to assist him, as provided in the last section, who without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor.

SEC. 968. The sheriff is the chief executive officer, and conservator of the peace of the county. In the execution of his office, it is his duty:

1. To arrest and commit to prison, all persons who break the peace or attempt to break it, and all persons guilty of public offences;
2. To defend his county against those who by riot or otherwise endanger the public peace or safety;
3. To execute the process and orders of the courts of justice, or of judicial officers, when delivered to him for that purpose, according to the provisions of this code, or other statute;
4. To execute all warrants delivered to him for that purpose, by other public officers, according to the provisions of particular statutes;
5. To attend the terms of the supreme, circuit, or county court held within his county, and to obey its lawful orders and directions.

SEC. 969. The county is not responsible for the acts of the sheriff.

TITLE IV.

Escapes, and the liabilities of sheriffs therefor.

SEC. 970. In what cases prisoner to be actually confined.
971. Sheriff, when liable for escape.
972. Measure of damages in action for escape.
973. Jail liberties, how and by whom established.
974. When jail liberties may be altered. Order to be posted in jail.
975. Admission of prisoner to jail liberties.
976. Undertaking therefor.
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978. Surrender of prisoner.
979. Retaking prisoner, after escape.
980. Action may be maintained against sheriff, or sureties for the liberties.
981. Judgment against sheriff, when evidence against sureties.
982. Sheriff who connives at escape, guilty of misdemeanor.

SEC. 970. A prisoner committed to the county jail for a contempt, or for trial, or upon a conviction for a public offence, or in default of security to appear as a witness in a criminal action, shall be actually confined in the jail, until he is legally discharged; and if he be permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape, and the sheriff or jailor permitting it is guilty of a misdemeanor, and when the prisoner escaping is also held until he pay a sum of money to a private party, or a fine or penalty to the state, such party or the state may recover, in a civil action against the sheriff the damages sustained by reason of the escape.

Sec. 971. A sheriff who suffers the escape of a prisoner, arrested or in jail, without the consent or connivance of the party on whose behalf the arrest or imprisonment was made, is liable to an action by such party therefor, as follows:

1. When the arrest is upon an order of arrest in a civil action, suit or proceeding, when the presence of the defendant at the return of the summons is necessary to enable the plaintiff to proceed therein, and the defendant does not appear at the time and place specified in the summons;

2. When the arrest or imprisonment is upon an order of arrest in any other civil action, suit or proceeding, or upon a surrender in exoneration of the sheriff or of bail, and the defendant is not found upon an execution against his person, issued to the proper county on a judgment or decree in such action, suit or proceeding;

3. When the arrest is on an execution or commitment to enforce the payment of money, and the party arrested is not re-captured or surrendered into custody, at the expiration of the time limited for the service thereof, or legally discharged therefrom;

4. When a person is imprisoned on an execution or commitment to enforce the payment of money and he escapes after the time limited for the service, and is not re-captured or surrendered before an action is commenced for the escape.

Sec. 972. The measure of damages, in an action for an escape, as provided in the last section, is as follows:

1. For the escape mentioned in subdivision 1, the actual damages sustained;

2. In any other case the amount expressed in the execution or commitment.

Sec. 973. The county court of each county shall designate a reasonsonable space of ground, adjacent to the jail of the county, to be denominated the jail liberties, as follows:

1. The liberties shall be laid out as nearly as may be in a square; except that a stream of water or highway may be adopted as an exterior line, though not in a straight line, or at right angles with the other exterior lines;

2. They shall not exceed five hundred acres in extent, and shall include the court house, and the office of the county clerk;

3. A description of their boundaries and extent, shall be contained in the order establishing them;

4. The boundaries and limits shall be designated by visible and permanent objects.

SEC. 974. Subject to the restrictions and limitations prescribed in the last section, the county court may alter the jail liberties, not oftener than once in two years. A certified copy of the order establishing or altering the jail liberties, shall be immediately delivered by the county clerk to the sheriff, who shall post the same in some conspicuous place in the county jail.

SEC. 975. A person in the custody of the sheriff, in a civil action, suit or proceeding, by virtue of an order of arrest, or an execution, or upon a surrender in exoneration of bail, or upon a commitment for not paying money, may go at large within the jail liberties, with the consent of the sheriff. He must, however, be admitted to the jail liberties, upon giving security therefor, as provided in the next section.

SEC. 976. The security for the jail liberties is taken by the sheriff, and shall be by written undertaking, executed by one or more sufficient sureties, to the effect that the prisoner will not go beyond the jail liberties, until legally discharged, or that the sureties will pay to the person at whose suit the prisoner is in custody, a sum mentioned in the undertaking, and which must be as follows:

1. If upon an order of arrest, or a surrender in exoneration of bail, in a civil action, suit or proceeding before judgment or decree, the sum recovered therein, not exceeding that mentioned in the writ of arrest, with interest and the sheriff's fees;

2. If upon an execution in a civil action, suit or proceeding, or a commitment for not paying money, a sum not exceeding that mentioned therein, with interest and the sheriff's fees.

SEC. 977. The sheriff is to determine the sufficiency of the sureties in the undertaking, and if at any time after the giving of the undertaking, he discover that the sureties are insufficient, he may recommit the prisoner to jail, until other sufficient surety be given.

SEC. 978. The sureties at any time before the judgment against them upon their undertaking, may surrender the prisoner; or he may surrender himself to the sheriff or jailor, in exoneration of his sureties from a future liability, but not from a liability incurred before the surrender. The sheriff or the jailor shall thereupon, on the written request of the sureties, receive the prisoner into custody, and shall indorse the surrender upon the undertaking, and if required, give the sureties a certificate thereof.

SEC. 979. If a prisoner, allowed by the sheriff to go at large within the jail liberties, go beyond them, the sheriff in whose custody he is may pursue and re-take him, as if he had escaped from jail.

SEC. 980. An action for the escape of a prisoner confined in a jail, or admitted to the jail liberties for either of the causes mentioned in section 975, may be maintained by the party entitled thereto, against either the sheriff or the sureties for the jail liberties; but the election to sue the sureties discharges the sheriff.

SEC. 981. If the action mentioned in the last section be commenced against the sheriff, and he give written notice thereof to the prisoner, or his sureties, a judgment in such action against the sheriff is conclusive evidence of his right to recover against the prisoner or his sureties as to any matter which was or might have been controverted in the action against the sheriff; and such judgment is evidence of the damages sustained by the sheriff whether the same has been collected off him or not; and he is also entitled to recover his costs and reasonable expenses in defending the action against him, as part of his damages.

SEC. 982. A sheriff, jailor, or other officer, who demands or receives a reward or gratuity to aid or assist, or who connives at the escape of a prisoner in his custody, for any of the causes mentioned in section 975, is guilty of a misdemeanor.

TITLE V.

Assignment of the jail, prisoners, and process to a new sheriff.

SEC. 983. Notice of qualification to former sheriff, and effect thereof.
984. Delivery of jail, process and prisoners to new sheriff.
985. Assignment of the same, and where filed.
986. Execution and return of process by former sheriff.

SEC. 983. When a new sheriff is elected or appointed, and has qualified, the county clerk shall give him a certificate of that fact, under his seal of office. Whenever thereafter, the new sheriff is authorized by statute to enter upon the duties of the office, he shall serve such certificate upon the former sheriff, from which time, his powers cease, except when otherwise specially provided.

SEC. 984. Within one day after the service of the certificate upon the former sheriff, he shall deliver to his successor:

1. The jail of the county, with its appurtenances and the property of the county therein:
2. The prisoners then confined in the county jail;
3. The process or other papers in his custody, authorizing or relating to the confinement of the prisoners, or if they have been returned, a written memorandum of them and the time and place of their return;
4. All process for the arrest of a party, and all papers relating to the summoning of jurors which have not been fully executed;
5. All executions and final process, except those which he has executed, or has begun to execute, by the collection of money or a levy on property;
6. All process or other papers for the enforcement of a provisional remedy not fully executed.

SEC. 985. He shall also at the same time deliver to the new sheriff a written assignment of the property, process, papers and prisoners delivered. The new sheriff shall thereupon acknowledge in writing upon the assignment the receipt of the property, process, papers and prisoners therein specified, and furnish the former sheriff with a certified copy thereof and file the original in the county clerk's office.

SEC. 986. The former sheriff shall return all process, whether before or after judgment or decree which he has fully executed, and shall complete the execution of all final process which he has begun to execute.

TITLE VI.

Miscellaneous provisions respecting sheriffs and their officers.

SEC. 987. Prisoners committed under process from courts of the United States, compensation therefor.
988. Liability of sheriff for United States prisoners.
989. Directions of party to sheriff, not to excuse him unless in writing.

Sec. 990. Compensation of sheriff for services to the state.
991. Sheriff justified by process regular on its face.
992. In executing process bound to show it.
993. Not to act as an attorney, nor have a partner who does.
994. Papers directed to prisoner to be delivered by sheriff.
995. Sheriff may appoint jailor. To be responsible for his acts.

Sec. 987. The sheriff shall receive and keep in the county jail every prisoner who is committed thereto, under civil or criminal process, issued by a court of the United States, until he be discharged according to the laws thereof, as if he had been committed under process issued by the authority of this state. He may also receive for his own use the sum payable by the United States for the use of the jail.

Sec. 988. A sheriff or jailor to whose custody a prisoner is committed, as provided in the last section, is answerable for his safe keeping, in the courts of the United States, according to the laws thereof.

Sec. 989. No direction or authority, by a party or his attorney, to a sheriff, or his officer, in respect to the execution of process or the return thereof, or to any act or omission relating thereto, can be shewn to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it be contained in a writing signed by the party to be charged or affected thereby, or his attorney.

Sec. 990. When a sheriff is legally required to perform a service on behalf of the state, which is not chargeable to his county, or some other person, his account therefor must be audited by the secretary of state, and paid out of the state treasury.

Sec. 991. A sheriff is justified in the execution of process, regular on its face, and appearing to have been issued by competent authority, whatever may be the defect in the proceedings in which it was issued.

Sec. 992. A sheriff executing process, of any kind, is then, and at all times subsequent, so long as he retains it, bound to show the same, with all papers attached, to any person legally interested therein.

Sec. 993. A sheriff, or any sheriff's officer, is prohibited during his continuance in office, from acting or having a partner who acts as an attorney.

Sec. 994. A sheriff or his officer, upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, shall forthwith deliver it to the prisoner, with a note thereon of the time of its service. For a neglect to do so the sheriff is liable to the prisoner for all damages occasioned thereby; and by a wilful omission in this respect, the sheriff or his officer upon whom the paper is served, is guilty of a misdemeanor.

SEC. 995. The sheriff may appoint a keeper of the county jail, to be denominated the jailor, for whose acts as such he is responsible. The appointment shall be in writing, and the sheriff shall file a certified copy thereof in the office of the county clerk.

TITLE VII.

Coroners and criers.

SEC. 996. General powers and duties of.
997. To execute process when sheriff a party.
998. Powers and duties of coroners in executing process.
999. Criers, their appointment, and duties.

SEC. 996. A coroner has power, and it is his duty:

1. When he is informed that a person has been killed or dangerously wounded by another, or has suddenly died, under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by criminal means, or has committed suicide, to inquire by the intervention of a jury, into the cause of the death or wound, and to perform the other duties incidental thereto, in the manner prescribed by statute.
2. To execute any process in any action, suit or proceeding, when the sheriff is a party, as prescribed in this title;
3. To exercise the powers and perform the duties conferred and imposed upon him, by other provisions of this code or other statute.

SEC. 997. When the sheriff is a party to any action, suit or proceeding, the process therein, which it would otherwise be the duty of the sheriff to execute, shall, except when otherwise expressly provided by this code, be executed by the coroner of the county.

SEC. 998. A coroner who executes process in any action, suit or proceeding, in the cases provided in this title, must execute it in the same manner as the sheriff should execute similar process, and in the execution thereof, and in every matter incidental thereto, he is invested with the powers, duties and responsibilities of the sheriff.

SEC. 999. Criers are appointed by the court in which they act, as elsewhere provided in this code. It is the duty of the crier

1. To attend the sittings of the court for which he is appointed;
2. To call parties and witnesses, and all other persons bound to appear at the court;
3. To make proclamation of the opening or adjournment of the court, or of any other matter under its direction.

CHAPTER XIV.

Of persons specially invested with ministerial powers, relating to the courts of justice.

TITLE I.—*Attorneys in general, and their admission.*

TITLE II.—*Duties of attorneys, and their authority.*

TITLE III.—*Change of attorney and his lien.*

TITLE IV.—*Resignation of attorney and effect thereof.*

TITLE V.—*Removal or suspension of attorneys, and the summary power of court over.*

TITLE VI.—*Persons specially authorized to execute process in particular cases.*

TITLE VII.—*Receivers.*

TITLE VIII.—*Trial, and district attorney fee.*

TITLE I.

Attorneys in general, and their admission.

Sec. 1000. Definition of an attorney.
1001. When cause may be prosecuted or defended in person or by attorney.
1002. Attorney a public officer, who may act as such.
1003. Application for admission, and proof thereon.
1004. Oath of office, and order of admission.
1005. Attorneys of other states or counties may appear as counsel.

Sec. 1000. An attorney is a person authorized to appear for and represent a party, in the written proceedings in any action, suit or proceeding, in any stage thereof; an attorney other than the one who represents the party in the written proceedings may also appear for and represent a party in court or before a judicial officer, and then he is known in the particular action, suit or proceeding, as counsel only, and his authority is limited to the matters that transpire in the court or before such officer at the time.

SEC. 1001. Any action, suit or proceeding may be prosecuted or defended by a party in person, or by attorney, except that the state, or a corporation, either public or private, appears by attorney in all cases; and where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of his client as between him and the adverse party, except as provided in the last section.

SEC. 1002. An attorney is a public officer, but any person may act in that capacity, who has been admitted as such by the supreme court of this state, or may be hereafter admitted as provided in this title.

SEC. 1003. An applicant for admission as an attorney must apply to the the supreme court, and must show:

1. That he is a citizen of the United States, and of this state, and of the age of twenty-one years, which proof may be made by his own affidavit;
2. That he is a person of good moral character, which may be proved by any evidence satisfactory to the court;
3. That he has the requisite learning and ability, which must be shown by the examination of the applicant, by the judges, or under their direction, in open court, at the term at which the application is made.

SEC. 1004. If, upon the examination, he be found qualified, the court shall administer an oath to the applicant, to support the constitution and laws of the United States, and of this state, and to faithfully and honestly demean himself in office. The court shall then direct an order to be entered, to the effect that the applicant is a citizen of the United States, and of this state, of the age of twenty-one years, of good moral character, and possesses the requisite learning and ability to practice as an attorney, in all the courts of this state, and has taken the oath of office; and upon the entry of the order he is entitled to practice as such attorney, and not otherwise.

SEC. 1005. Whenever it appears that a person of any other state or country is an attorney of the highest court of record in such state or country, he may appear as counsel for a party in a particular action, suit or proceeding then pending in court, or before a judicial officer of this state, and not otherwise.

TITLE II.

Duties of attorneys and their authorities.

SEC. 1006. Their general duties.
1007. Authority of an attorney.
1008. Proceedings, when party alleges that attorney appears for him without authority.
1009. When attorney may be compelled to show authority.

SEC. 1006. It is the duty of an attorney:

1. To support the constitution and laws of the United States, and of this state;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, suits, or proceedings, or defences, only, as may appear to him legal and just, except the defence of a person charged with a public offence;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the court or jury, by any artifice, or false statement of law or fact;

5. To maintain, inviolate, the confidence, and at every peril to himself, to preserve the secrets of his clients;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or the continuance of an action, suit or proceeding, from any motives of passion or interest; and

8. Never to reject, for any consideration personal to himself, the cause of the defenceless or the oppressed.

SEC. 1007. An attorney has authority:

1. To bind his client, in any of the proceedings in an action, suit or proceeding, by his agreement filed with the clerk, or entered upon the journal of the court, and not otherwise;

2. To receive money or property claimed by his client in an action, suit or proceeding, during the pendency thereof, or within three years after judgment or decree, and upon the payment or delivery thereof, and not otherwise, to discharge the claim, or acknowledge satisfaction of the judgment or decree:

But this section does not prevent a party from employing a new attorney, to issue execution upon a judgment or decree, or to take the other proceedings, prescribed by this code for its enforcement; and when he does so the authority of the former attorney ceases.

Sec. 1008. If it be alleged by a party for whom an attorney appears, that he does so without authority, and the allegation be verified by the affidavit of the party, the court may, if it find the allegation true, at any stage of the proceedings, relieve the party for whom the attorney has assumed to appear, from the consequences of his acts.

Sec. 1009. The court or judge thereof, may, on motion of either party, and on showing reasonable ground therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he appears, and until he does so, may stay all proceedings by him on behalf of the party for whom he assumes to appear.

TITLE III.

Change of attorney, and his lien.

Sec. 1010. Attorney, how changed.
1011. Notice of change.
1012. Lien of attorneys.

Sec. 1010. The attorney in an action, suit or proceeding, may be changed at any time before judgment or decree, or final determination, as follows:

1. Upon his own consent filed with the clerk or entered upon the journal; or,
2. Upon the order of the court or judge thereof, on the application of the client, or the attorney, for sufficient cause.

Sec. 1011. When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, shall be given to the adverse party. Until then he is bound to recognize the former attorney.

Sec. 1012. An attorney has a lien for his compensation, whether specially agreed upon, or implied, as provided in this section:

1. Upon the papers of his client, which have come into his possession in the course of his professional employment;

2. Upon money in his hands belonging to his client;

3. Upon money in the hands of the adverse party, in an action, suit or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

4. Upon a judgment or decree, to the extent of the costs included therein, or if there be a special agreement, to the extent of the compensation specially agreed on, from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk where such judgment or decree is entered and docketed.

This lien is, however, subordinate to the rights existing between the parties to the action, suit or proceeding.

TITLE IV.

Resignation of attorneys, and effect thereof.

SEC. 1013. Resignation, how made, and its effect.

1014. Certified copy of, to be filed in supreme court, may be readmitted.

SEC. 1013. An attorney may at any time file in the office of the county clerk, of the county in which he resides, a written resignation; and after the filing thereof, he is not entitled to the rights, nor subject to the disabilities or prohibitions incident to that relation; except that he is still subject to the power of the court in respect to matters arising while he was an attorney.

SEC. 1014. The clerk of the county with whom such resignation is filed, shall immediately forward a certified copy thereof to the clerk of the supreme court, who shall file the same in his office. An attorney who has resigned, may, at any time thereafter be re-admitted to practice as such, in the same manner as if he had never been so admitted.

TITLE V.

Removal or suspension of attorneys, and the summary power of court over.

SEC. 1015. By what court and for what causes, and attorney may be removed or suspended.

1016. By whom the proceeding to be instituted.

1017. Accusation, how made.

1018. Order for accused to appear and answer.

1019. If accused do not appear, court to proceed.

SEC. 1020. May demur to or controvert the accusation.
1021. If demurrer not sustained, must answer forthwith. Judgment for want of answer or trial.
1022. Accusation on knowledge of the court presumed to be true, but may [be] shown otherwise.
1023. Circuit or county court may suspend attorneys until next term of supreme court.
1024. Proceeding to compel an attorney to deliver over money or papers.
1025. How court to proceed, if attorney claim a lien.

SEC. 1015. An attorney may be removed or suspended by the supreme court for either of the following causes, arising after his admission to practice:

1. Upon his being convicted of any felony, or of a misdemeanor, involving moral turpitude; in either of which cases, the record of his conviction is conclusive evidence;

2. For a willful disobedience or violation of the order of a court, requiring him to do or forbear an act connected with, or in the course of his profession;

3. For being guilty of any willful deceit or misconduct in his profession;

4. For a willful violation of any of the provisions of section 1006.

SEC. 1016. The proceeding to remove an attorney, as provided in the last section, shall be taken by the court, of its own motion, for matters within its knowledge, or that of any of the judges thereof, otherwise it may be taken upon the information of another.

SEC. 1017. If the proceedings be upon the motion of the court or judges thereof, for matters within its knowledge, the accusation shall be made by an order of the court reciting the facts charged. If upon the information of another, the accusation must be presented to the court, in writing, and verified by the oath of the person making it, or of some other person, to the effect that the charges therein contained are true, as he believes.

SEC. 1018. After the accusation has been made or received, the court shall forthwith make an order requiring the accused to appear and answer the accusation, at a specified time in the same, or a subsequent term; and shall cause a copy of the order and of the accusation to be served upon the accused, within a prescribed time, before the day appointed in the order to appear and answer. But when the proceeding is upon the information of another, the accusation shall be dismissed at once, unless it appear therefrom that the accused should be required to appear and answer the same.

SEC. 1019. The accused must appear at the time appointed in the order; and answer the accusation, unless, for sufficient cause, the court assign another day for that purpose. If he do not appear the court may proceed and determine the accusation in his absence.

SEC. 1020. The accused may demur to the accusation for insufficiency, or controvert it by answer. The demurrer and answer shall be in writing, and the latter shall be verified by the oath of the accused in the same manner as a pleading in an action at law.

SEC. 1021. If a demurrer for insufficiency be not sustained, the accused shall answer forthwith. If he plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If he controvert the matters charged, the court shall then, or at such time as it may appoint, proceed to try the accusation, and give a judgment of removal, suspension or acquittal, according to law, and the right of the case.

SEC. 1022. When an accusation is made upon the knowledge of the court, or the judges thereof, the facts therein stated are presumed to be true, but if the accused controvert the accusation, he is allowed, on the trial, to overcome such presumption, by the introduction of any proper or pertinent evidence therefor.

SEC. 1023. Any circuit or county court may suspend an attorney from practicing therein for any of the causes mentioned in section 1015, for a period not beyond the adjournment of the next term of the supreme court. The mode of proceeding shall be the same as provided in like proceedings in the supreme court. The court giving the judgment of suspension shall cause a certified copy of the judgment, pleadings and proceedings to be transmitted to the supreme court at the next term thereof, and thereupon such court shall proceed against the party suspended, as if the proceeding had originated in that court.

SEC. 1024. When an attorney refuses to deliver over money or papers, to a person, from or for whom he has received them in the course of professional employment, whether in a judicial proceeding or not, he may be required by an order of the court in which a judicial proceeding was prosecuted or defended, or if none were prosecuted or defended; then by an order of the circuit court or judge thereof for the county where such attorney resides or may be found, to do so within a specified time, or shew cause why he should not be punished for a contempt.

SEC. 1025. If, however, the attorney claim a lein upon the money or papers, under the provisions of section 1012, the court shall:

1. Impose as a condition of making the order that the client give security, in form and amount to be directed, to satisfy the lien, when determined in an action or suit; or

2. Summarily inquire into the facts on which the claim of a lien is founded, and determine the same; or

3. Direct the trial of the controversy by a jury, or refer it, and upon the verdict or report, determine the same as in other cases.

TITLE VI.

Persons specially authorized to execute process in particular cases.

SEC. 1026. Elisor, when and by whom appointed.
1027. General powers, duties and responsibilities of elisor.

SEC. 1026. Process in any action, suit or proceeding may be executed by a person specially appointed by the court or judge thereof, who is denominated an elisor, in either of the following cases:

1. When the sheriff and coroner are parties;

2. When either of those officers is a party, and the process is against one of them, for a disobedience of an order or process against the other.

3. When the office of sheriff and coroner are vacant, or when it appears to the satisfaction of such court or judge, that such process should be executed immediately, and before the sheriff or coroner could be reached.

SEC. 1027. An elisor may be required to give security in such manner as the court may direct. When process is delivered to him, he must execute it in the same manner as the sheriff should execute similar process, and in the execution thereof, and in every matter incidental thereto, he is invested with the powers, duties and responsibilities of the sheriff.

TITLE VII.

Receivers.

SEC. 1028. Receiver, definition of.
1029. In what cases he may be appointed.
1030. His oath and undertaking.

SEC. 1028. A receiver is a person appointed by a court or judicial officer, to take charge of property during the pendency of a civil action, suit or proceeding, or upon a judgment, decree or order therein, and to manage and dispose of it as the court or officer may direct.

SEC. 1029. A receiver may be appointed in any civil action, suit or proceeding, other than an action for the recovery of specific personal property:

1. Provisionally, before judgment or decree, on the application of either party, when his right to the property, which is the subject of the action, suit or proceeding, and which is in the possession of an adverse party, is probable, and the property, or its rents or profits, are in danger of being lost or materially injured or impaired;

2. After judgment or decree, to carry the same into effect;

3. To dispose of the property according to the judgment or decree, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment or decree;

4. In cases provided in this code, or by other statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

5. In the cases provided in this code, when a debtor has been declared insolvent.

SEC. 1030. A receiver, before entering upon his duties, shall be sworn faithfully to perform his trust, to the best of his ability, and shall also file with the clerk of the court, an undertaking, of one or more sufficient sureties, in a specified sum, to be fixed by the court or judge thereof, the effect that he will faithfully discharge the duties of receiver, and will obey the orders of the court or judge thereof, in respect thereto. The sureties must justify in the same manner as bail upon an arrest.

TITLE VIII.

Trial, and district attorney fee.

SEC. 1031. Trial, and attorney fee; definition of.
1032. Trial fee, amount of in the several courts.
1033. Trial fee, to be paid by whom, and when recovered as a disbursement.
1034. When state or county a party, fee need not be paid by it.
1035. In justice's court when and to whom paid.
1036. Proceeding in circuit court, where county court has jurisdiction.

SEC. 1037. When party too poor to pay fee, may proceed without it.
1038. Trial fee to be paid to clerk. Clerk to pay to treasurer and keep account.
1039. Trial fees in supreme court, how disposed of.
1040. In justice's court, fee to be paid to jury by justice.
1041. Fee of district attorney.
1042. How and by whom paid.
1043. In criminal action fee to be taxed against defendant.
1044. In other than criminal action, fee not taxed, but county entitled to costs. Fees earned in supreme court, how paid.

SEC. 1031. Parties to a judicial proceeding, are required to contribute towards the expense of maintaining courts of justice, or a particular action, suit or proceeding therein, by the payment of certain sums of money, as provided in this title, which are denominated trial and district attorney's fees.

SEC. 1032. The trial fee in the several courts is as follows.

1. In the supreme court, upon each appeal heard and determined,—six dollars;

2. In the circuit court, for every trial by jury,—twelve dollars; for every trial by the court,—six dollars; for every judgment or decree given without trial,—three dollars;

3. In the the county court one half the amount required in the circuit court in like cases;

4. In justices court, for every trial by jury,—six dollars.

SEC. 1033. The trial fee is to be paid by the plaintiff, appellant or moving party, before he is entitled to or can claim the trial or other proceeding upon which such fee is imposed, and if the party paying such fee prevail in the action suit or proceeding, so as to be entitled to recover costs therein, such fee shall be allowed and taxed as a disbursement, and collected off the adverse party.

SEC. 1034. When the state or any county therein is a party to a judicial proceeding, it need not pay the trial fee in advance, and if it be entitled to recover costs therein, such fee shall be allowed and taxed in its favor as a disbursement, and collected off the adverse party as in ordinary cases.

SEC. 1035. The trial fee in a justices court, shall be paid to the justice upon the demand for a jury, and unless so paid, the demand shall be disregarded, and the trial proceed as if no such demand had been made; except, when a party is prosecuted in a criminal action at the suit of the state, in which case, the party is entitled to a jury trial without the prepayment of such fee, and if judgment be given against him the fee shall be allowed and taxed in favor of the state as other disbursements, in ordinary cases.

SEC. 1036. Whenever any action, suit or proceeding is commenced in the circuit court, which might have been commenced in the county court, the plaintiff therein, shall pay the trial fees required in the circuit court, but shall not be entitled to recover off the adverse party, any more of such fees than an amount equal to the fees in the county court in a like case.

SEC. 1037. If at any time it appear to the satisfaction of the court or judge thereof, from the affidavit of the party or other evidence, that he cannot pay the trial fee, such court or judge may direct that he be allowed to proceed without the prepayment thereof, but if such party prevail so as to be entitled to collect such fee as a disbursement off the adverse party, when collected, it shall be retained by the clerk as if paid in advance.

SEC. 1038. The trial fees shall be paid to the clerk of the court, who shall keep a regular account of them, and by whom paid in his fee book, and pay the amount of such fees received, to the treasurer of the county, as often as once a month, taking his receipt therefor in duplicate, one of which such clerk shall file in his office, and the other he may retain as his private property. At the annual accounting of the county officers with the county court, the clerk shall exhibit to such court, a detailed statement of the trial fees received by him in the course of the year, verified by his own oath.

SEC. 1039. The trial fees in the supreme court, shall be paid, deposited and accounted for as provided in the last section, except that they shall be paid by the clerk to the treasurer of the state, and that the verified statement of the clerk shall be made to the secretary of state state on or before the first Monday in September, for the year preceding.

SEC. 1040. In justices court, the trial fee is paid to the justice. He shall keep an account of them and by whom paid, and distribute the amount among the jury in the particular case, in payment of their legal fees.

SEC. 1041. The district attorney in addition to the salary and per diem allowed by law, shall receive the following fees:

1. In a criminal action, where the punishment is death or imprisonment for life, if the defendant is convicted,—twenty-five dollars, or if acquitted, one-half thereof;

2. In a criminal action, where the punishment is imprisonment in the penitentiary for a term of years, if the defendant is convicted, —fifteen dollars, or if acquitted, one-half thereof;

3. In a criminal action for a misdemeanor, if the defendant is convicted, ten dollars, or if acquitted, one half thereof;

4. In a civil action for the recovery of any fine, penalty or forfeiture, ten per cent. of the amount recovered;

5. For prosecuting or defending any other civil action, suit or proceeding, not herein mentioned, to which the state or any county in his district may be a party, twenty five-dollars;

6.. For actually defending on behalf of the state, a suit for the dissolution of the marriage contract, or to declare the same void, twenty dollars.

7. For prosecuting or defending any action, suit or proceeding herein mentioned on an appeal to the supreme court, twenty dollars;

SEC. 1042. The fees provided in the last section shall be paid to the district attorney by the county where the service is rendered. At each term of court, the court shall ascertain the fees to which the district attorney is entitled for the term, and direct an order to be entered upon the journal that the same be paid. Upon the presentation of a certified copy of such order to the proper officer of the county, it is his duty to draw his warrant upon the treasurer of the county for the amount therein specified.

SEC. 1043. In a criminal action if the defendant is convicted, the clerk shall allow and tax in favor of the county, the amount of the district attoney's fee in the action, which shall be collected off the defendant. Such fees shall be paid by the clerk to the treasurer of the county, and accounted for in the same manner as trial fees.

SEC. 1044. In an action, suit or proceeding, other than a criminal action, the fee of the district attorney is not taxed as a disbursement, but the county that is liable to pay such fee, is entitled to costs off the adverse party as in ordinary cases. Such costs when collected, shall be paid by the clerk to the treasurer of the county and accounted for in the same manner as trial fees. Fees earned in the supreme court are to be paid by the county from whence the appeal was taken, upon the order of the court as in the courts below, and when collected are disposed of in the same manner.

CHAPTER XV.

TITLE I.—*In general.*

TITLE II.—*The proof of wills and the appointment of executors and administrators.*

TITLE III.—*The inventory of the estate.*

TITLE IV.—*The support of the widow and minor children.*

TITLE V.—*Claims against the estate.*

TITLE VI.—*Sale of property by executors or administrators.*

TITLE VII.—*Accounts of executors and administrators.*

TITLE VIII.—*Payment of claims and charges.*

TITLE I.

In general.

SEC. 1045. Forms of pleadings.
1046. Nature of procedure. How court exercises its powers.
1047. Books and records relating to probate matters.
1048. Index to such books.
1049. Costs and disbursements.
1050. Orders or decrees for the payment of money, how enforced.

SEC. 1045. There are no particular pleadings or forms thereof, in the county court, when exercising the jurisdiction of probate matters, as specified in section 869, other than as provided in this chapter.

SEC. 1046. The mode of proceeding is in the nature of that in a suit in equity as distinguished from an action at law. The proceedings are in writing, and are had upon the application of a party, or the order of the court. The court exercises its powers by means of:

1. A citation to the party:
2. An affidavit or the verified petition or statement of a party;
3. A subpœna to a witness;
4. Orders and decrees; and
5. An execution or warrant to enforce them.

SEC. 1047. The proceedings in probate matters shall be entered and recorded in the following books:

1. A register, in which shall be entered a memorandum of all official business transacted by the court or judge thereof, appertaining to the estate of each person deceased, under the name of such person; that pertaining to the guardianship of an infant under the name of such infant; that pertaining to an insane person or a drunkard, under his name;

2. A record of wills, in which shall be recorded all wills proven before the court or judge thereof with the order of probate thereof, and of all wills proved elsewhere, upon which letters of administration are issued by the direction of such court or judge;

3. A record of the appointment of administrators, whether general or special, or of a partnership and of executors;

4. A record of the appointment of guardians of infants, insane persons and drunkards;

5. A record of accounting and distribution, in which shall be entered a summary balance sheet, of the accounts of administrators, executors and guardians, with the orders and decrees relating to the same; a memorandum of executions issued thereon, with a note of satisfaction when satisfied; also, orders and decrees relating to the sale of real property, and to the distribution of the proceeds thereof; and notices of all money or securities paid or deposited in court, as proceeds of such sales, or otherwise; and a statement showing the names of creditors, and the debts established and entitled to distribution, the amount to which each person is entitled out of such funds, and the amount actually paid to each person, and when paid;

6. A record of the appointment of admeasurer of dower, with all orders and decrees relating to the same, and the admeasurers reports;

7. An order book in which shall be entered orders directing the conduct of executors, administrators or guardians; orders for publication of notice to creditors, orders in behalf of creditors, directing debts to be paid, or allowing an execution to be issued; appointments of special guardians, appraisers and referees; order relating to the production of a will, to removal of executors, administrators or guardians, or to sureties therefor; and generally, all other orders not required to be entered in some other.

SEC. 1048. To each of such books, there shall be attached an index, securely bound in the volume, referring to the entries or records in alphabetical order, under the name of the person to whose estate or business they relate, and naming the page of the book where the entry or record is made.

Sec. 1049. Costs may be awarded in favor of one party against another, to be paid personally or out of the estate or fund, in any proceedings contested adversely, but such costs cannot exceed those allowed in the trial of a civil action in the county court. Witnesses' fees and other disbursements similar to those allowed on the trial of a civil action may also be allowed to be paid in like manner.

Sec. 1050. Orders or decrees for the payment of money may be enforced by execution, or otherwise in the same manner as orders or decrees for the payment of money in the circuit court.

TITLE II.

The proof of wills, and the appointment of executors and administrators.

Sec. 1051. In what county will may be proven, and when.
1052. Who is to be appointed executor, or administrator with the will annexed.
1053. In what court administration to be granted, and who is entitled thereto.
1054. When persons entitled must apply.
1055. Administration to be granted to the husband, unless.
1056. Undertaking of executor or administrator.
1057. Qualification and justification of sureties.
1058. A non-resident or minor, may qualify as executor after the removal of the disability.
1059. Appointment of special administrator.
1060. Petition to state facts.
1061. Proceedings, when will found after administration granted.
1062. Heir, may apply for removal of executor or administrator.
1063. Non resident executor or administrator, may be removed.
1064. New undertaking, when old insufficient.
1065. Effect of new undertaking, or the failure to give it..
1066. Death, resignation, or removal of one or all the executors or administrators, effect of.
1067. New administrator may maintain action against former one, his sureties or representatives.
1068. Power of the court over an administrator.
1069. When deceased a member of a co-partnership, inventory and appraisement of estate.
1070. Partnership property may be administered by surviving partner. Application therefor.
1071. Denominated an administrator of the partnership, his powers and duties.
1072. Undertaking of administrator of the partnership.
1073. When administration of partnership properly devolves upon the general administrator.
1074. Duty of surviving partner, towards administrator.
1075. How last section may be enforced.
1076. Who not qualified to act as executor or administrator.
1077. Form of letters testamentary.
1078. Form of letters of administration.
1079. Resignation of executor or administrator

SEC. 1051. Proof of a will shall be taken by the county court as follows:

1. When the testator, at or immediately before his death, was an inhabitant of the county, in whatever place he may have died;
2. When the testator, not being an inhabitant of this state, shall have died in the county leaving assets therein;
3. When the testator not being an inhabitant of this state, shall have died out of the state, leaving assets in the county;
4. When the testator, not being an inhabitant of this state, shall have died out of the state, not leaving assets therein, but where assets thereafter come into the county;
5. When real property, devised by the testator, is situated in the county, and no other county court has gained jurisdiction, under either of the preceding subdivisions of this section.

SEC. 1052. When a will is proven, letters testamentary shall be issued to the persons therein named as executors, or to such of them as give notice of their acceptance of the trust and are qualified. If all the persons therein named decline to accept or be disqualified, letters of administration with the will annexed shall be issued to the person, to whom the administration would have been granted, if there had been no will.

SEC. 1053. Administration of the estate of an intestate shall be granted by the county court, authorized to take proof of a will, as prescribed in section 1051, in case such intestate had made a will. Administration shall be granted, and letters thereof issue as follows:

1. To the widow or next of kin, or both, in the discretion of the court;
2. To one or more of the principal creditors; or
3. To any other person competent and qualified whom the court may select.

SEC. 1054. The persons named in the subdivisions of the last section, if qualified and competent for the trust, shall be entitled to the administration in the order therein named. If those named in subdivision 1 do not apply for the administration within thirty days from the decease of the intestate, they shall be deemed to have renounced their right thereto, but the court or judge thereof in its discretion may, if they reside within the county, direct that a citation issue to them, requiring them within such period to apply for or renounce their right of administration; and if the persons named in subdivision 2 do not make such application within forty days from such decease, they shall be deemed to have renounced their right to the administration also.

SEC. 1055. If the deceased were a married woman, the administration of her estate, shall in all cases be granted to her husband, if he be qualified and competent for the trust, and apply therefor within thirty days from her decease, unless by force of a marriage settlement, or otherwise, she shall have made some testamentary disposition of her property, which shall render it necessary and proper to grant the administration to some other person.

SEC. 1056. No executor or administrator is authorized to act as such, until he shall file with the clerk an undertaking, with one or more sufficient sureties, in a sum not less than twice the probable value of the estate, payable to whom it may concern, to be void upon the condition that such executor or administrator faithfully performs his trust according to law.

SEC. 1057. The sureties in such undertaking shall have the qualifications of bail upon arrest, and shall justify before the court or judge thereof, and the justification shall be filed with the undertaking.

SEC. 1058. If a person be named in a will as executor, who is a non-resident of the state or a minor, upon the removal of such disability, he is entitled to qualify as such executor, if he apply therefor within thirty days from the removal of such disability, if otherwise competent. If, in the meantime, an administrator with the will annexed, has been appointed, his powers and duties cease with the qualification of such executor; but if another executor has qualified and is acting as such, they thereby become joint executors.

SEC. 1059. When for any reason there shall be delay in issuing letters testamentary or of administration, and the property of the deceased is in danger of being lost, injured or depreciated, the court or judge thereof may appoint a special administrator, to take charge of the estate; who shall qualify in like manner, and have the powers and perform the duties of an administrator generally, except that he is not authorized to pay the debts of, or otherwise discharge any obligation against the deceased. Upon the issuing of letters testamentary or of administration, the powers of the special administrator cease.

SEC. 1060. In an application to prove a will or for the appointment of an executor or administrator, the petition shall set forth the facts necessary to give the court jurisdiction, and also state whether the deceased left a will or not, and the names age and residence so far as known of his heirs.

SEC. 1061. If, after administration has been granted upon an estate, a will of the deceased be found and proven, the letters of administration shall be revoked, and letters testamentary or of administration with the will annexed, shall be issued; and if after a will has been proven, and letters testamentary or of administration with the will annexed, have been issued thereon, such will should be set aside, declared void, or inoperative, such letters shall be revoked, and letters of administration issued.

SEC. 1062. Any heir, legatee, devisee, creditor, or other person interested in the estate, may apply for the removal of an executor or administrator, who has become of unsound mind, or been convicted of any felony, or a misdemeanor involving moral turpitude, or who has, in any way, been unfaithful to, or neglected his trust, to the probable loss of the applicant. Such application shall be by petition, and upon notice to the executor or administrator, and if the court find the charge to be true, it shall make an order removing such executor or administrator, and revoke his letters.

SEC. 1063. If an executor or administrator become a non-resident of this state, he may be removed and his letters revoked in the manner prescribed in the last section, except that the notice may be given by publication for such time as the court or judge thereof may direct.

SEC. 1064. Whenever the amount of an executor's or administrator's undertaking is insufficient, or the sureties therein, or either of them, have become non-residents of this state, or are likely to, or have become insolvent, such executor or administrator shall be required to give a new and sufficient undertaking. The application for such new undertaking may be made by any heir, legatee, devisee, creditor, or other person interested in the estate, and in the manner prescribed in section 1062, for the removal of executors and administrators.

SEC. 1065. Such new undertaking when given and received, shall discharge the sureties in the former undertaking, from any liability on account of their principal, arising from his acts or omissions subsequent thereto. When a new undertaking is ordered, if the executor or administrator fail to comply therewith, within five days from the entry thereof, or such further time as the order may prescribe, thenceforward the authority of such exector or administrator shall cease, and he shall be deemed removed and his letters revoked.

SEC. 1066. Whenever an executor or administrator shall die, resign or be removed, if there be a co-executor or administrator, he shall thenceforward exercise the powers and perform the duties of the trust; and if all the executors or administrators shall die, resign, or be removed, administration of the estate remaining unadministered, shall be granted to those next entitled, if they be competent and qualified.

SEC. 1067. The surviving or remaining executor or administrator, or the new administrator as the case may be, is entitled to the exclusive administration of the estate, and for that purpose may maintain any necessary and proper action, suit or proceeding on account thereof, against the executor or administrator ceasing to act or against his sureties or representatives.

SEC. 1068. Whenever, it, appears probable to the court or judge that any of the causes for removal of an exector or administrator exist or have transpired as specified in section 1062, it shall be the duty of such court or judge to cite such executor or administrator to appear and show cause why he should not be removed, and if he fail to appear, or to show sufficient cause, an order shall be made removing him and revoking his letters; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end, that he faithfully and diligently perform the duties of his trust, according to law.

SEC. 1069. The executor or administrator of a deceased person who was a member a co-partnership, shall include in the inventory of such person's estate in a separate schedule, the whole of the property of such partnership; and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in the partnership property, after the payment or satisfaction of all the debts and liabilities of the partnership.

SEC. 1070. After the inventory is taken the partnership property shall be in the custody and control of the executor or administrator for the purposes of administration, unless the surviving partner shall, within five days from the filing of the inventory, or such further time as the court or judge may allow, apply for the administration thereof, and give the undertaking therefor hereinafter prescribed.

SEC. 1071. If the surviving partner apply therefor as provided in the last section, he is entitled to the administration of the partnership estate, if he have the qualifications and competency required for a general administrator. He is denominated an administrator of the partnership, and his powers and duties extend to the settlement of the partnership business generally, and the payment or transfer of the interest of the deceased in the partnership property remaining after the payment or satisfaction of the debts and liabilities of the partnership, to the executor or general administrator within six months from the date of his appointment, or such further time if necessary as the court or judge may allow. In the exercise of his powers and the performance of his duties, the administrator of the partnership, is subject to the same limitations and liabilities, and control and jurisdiction of the court, as a general administrator.

SEC. 1072. The undertaking of the administrator of the partnership, shall be in a sum not less than double the value of the partnership property, and shall be given in the same manner and be to the same effect as the undertaking of a general administrator.

SEC. 1073. In case the surviving partner is not appointed administrator of the partnership, the administration thereof devolves upon the executor or general administrator, but before entering upon the duties of such administration, he shall give an additional undertaking in double the value of the partnership property.

SEC. 1074. Every surviving partner, on the demand of an executor or administrator of a deceased partner, shall exhibit and give information concerning the property of the partnership at the time of the death of the deceased partner, so that the same may be correctly inventoried and appraised; and in case the administration thereof shall devolve upon the executor or administrator, such survivor shall deliver or transfer to him on demand all the property of the partnership, including all books, papers and documents pertaining to the same, and shall afford him all reasonable information and facilities for the performance of the duties of his trust.

SEC. 1075. Any surviving partner who shall refuse or neglect to comply with the requirements of the last section, may be cited to appear before the court or judge, and unless he show cause to the contrary, the court or judge shall require him to comply with such section in the particular complained of.

SEC. 1076. The following persons are not qualified to act as executors or administrators: non-residents of this state; minors; judicial officers, other than justices of the peace; persons of unsound mind, or who have been convicted of any felony, or of a misdemeanor involving moral turpitude; or a married woman.

SEC. 1077. Letters testamentary may be in the following form:

STATE OF OREGON, } ss
COUNTY OF ——— }

To all persons to whom these presents shall come, Greeting:

Know ye, that the will of —— ——, deceased, a copy of which is hereto annexed, has been duly proven in the county court, for the county aforesaid, and that —— ——, who is named executor therein, has been duly appointed such executor by the court aforesaid; this, therefore, authorizes the said —— —— to administer the estate of the said —— ——, deceased, according to law.

[L. S.] In testimony whereof, I, —— ——, clerk of the county court have hereunto subscribed my name and affixed the seal of said court, this ——— day of ———, A. D. 18—.

A. B.,
Clerk County Court.

SEC. 1078. Letters of administration may be in the following form:

STATE OF OREGON, } ss
COUNTY OF ——— }

To all persons to whom these presents shall come, Greeting:

Know ye, that it appearing to the court aforesaid that —— —— has died intestate, leaving at the time of his death property in this state, such court has duly appointed —— —— administrator of the estate of such ———; this, therefore, authorizes the said —— —— to administer the estate of the said —— ——, deceased, according to law.

In testimony whereof, &c., the same as in letters testamentary. Letters to an administrator of the partnership, with the will annexed, or to a special administrator, may be issued according to the foregoing forms, with such variations as may be proper in the particular case.

SEC. 1079. The court or judge thereof in its discretion may allow an executor or administrator to resign, when it appears that such executor or administrator has published a notice of his intention to apply therefor in some newspaper in general circulation in the county for the period of four weeks prior to such application, and that he is not in default in any matter connected with the duties of his trust. Such executor or administrator shall pay the costs of the proceeding, and if the application is allowed, he shall surrender his letters to be canceled, and his powers as such, shall cease from that time forward.

TITLE III.

The inventory of the estate.

SEC. 1080. Inventory, when made and how verified.
1081. Inventory, what to contain.
1082. Appraisement, and appointment of appraiser.
1083. Oath of appraisers.
1084. Appraisement of money and debts.
1085. Debt due by person named in will as executor.
1086. Discharge or bequest of a claim by will, effect of.
1087. Property discovered after filing inventory.
1088. Who entitled to the possession and control of property of deceased.
1089. Proceeding against person charged with secreting property or writing relating thereto.
1090. Mode of examination of such person.
1091. Proceeding in case such person refuses to appear or answer.
1092. Proceeding to compel account against party entrusted with any portion of estate.
1093. Damages for conversion of property before administration.

SEC. 1080. An executor or administrator, shall, within one month from the date of his appointment, or, if necessary, such further time as the court or judge thereof may allow, make, and file with the clerk, an inventory, verified by his own oath, of all the real and personal property of the deceased, which shall come to his possession or knowledge.

SEC. 1081. The inventory shall contain an account of all money belonging to deceased, or a statement that none has come to the possession or knowledge of the executor or administrator; also a statement of all debts due the deceased, the written evidence thereof, and the security therefor, if any exist, specifying the name of each debtor, the date of each written evidence of debt, and security therefor, the sum originally payable, the indorsements thereon, if any, and their dates, and the sum appearing then to be due thereon.

SEC. 1082. Before the inventory is filed, the property therein specified, shall be appraised at its true cash value, by three disinterested and competent persons, who shall be appointed by the court or judge thereof; but if any part of the property shall be in a county, other than that where the administration is granted, the appraisers thereof may be appointed by such court or judge, or the court or judge thereof of the county where the property shall be; in the latter case a certified copy of the order of appointment, shall be filed with the inventory.

SEC. 1083. Before making the appraisement, the appraisers shall each take and subscribe, an affidavit, to be filed with the inventory, to the effect, that he will honestly and impartially appraise the property which shall be exhibited to him, according to the best of his knowledge and ability.

SEC. 1084. The appraisers shall appraise each article of property separately, and set down the value thereof in dollars and cents, opposite the entry of the article in the inventory. Money, of whatever nature, that is a legal tender, is to be appraised at its nominal value; but debts of all descriptions or kinds are to be appraised at that sum, which in the judgment of the appraisers, may be realized from them, by due process of law. When the appraisement is completed, the inventory shall be signed by the appraisers.

SEC. 1085. The naming any one executor in a will, shall not operate to discharge such executor from any claim which the testator had against him, but the claim shall be included in the inventory, and, if the person so named, afterwards take upon himself the administration of the estate, he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable, otherwise he is liable for such claim as any other debtor of the deceased.

SEC. 1086. The discharge or bequest in a will, of any claim of the testator against a person named as executor therein, or against any other person, shall as against the creditors of the deceased be invalid. Such claim shall be included in the inventory, and for all the purposes of administration, is to be deemed and treated as a specific legacy of that amount.

SEC. 1087. If after the filing of the inventory, property not mentioned therein shall come to the knowledge or possession of the executor or administrator, it is his duty immediately to make an inventory thereof, and cause the same to be appraised in the manner prescribed in this title, and file the same with the clerk.

SEC. 1088. The executor or administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof, until the administration is completed, or the same is surrendered to the heirs or devisees, by order of the court or judge thereof; but where such property or any portion thereof is in the possession of a third person by virtue of a valid subsisting lease or bailment the possession and control of the executor or administrator is subordinate to the right of the lessee or bailee. During the time the property is in the possession or control of the executor or administrator, it is his duty to keep the same in repair, and preserve it from loss or decay as far as possible.

Sec. 1089. Whenever it appears probable from the affidavit of an executor or administrator, or that of an heir or other person interested in the estate, that any person has concealed, or in any way secreted or disposed of any property of the estate, or any writing relating or pertaining thereto, or that such person has knowledge of any such property or writing being so concealed, secreted or disposed of, and refuse to disclose the same to the executor or administrator, the court or judge thereof upon the application of such executor or administrator, may cite such person to appear and answer under oath concerning the matter charged.

Sec. 1090. Such examination may be oral or upon written interrogatories filed by the applicant, but in either case the answers of the person cited shall be reduced to writing, and subscribed by him and filed. If such person be not in the county, where administration is granted, the proceeding may be either before the court or judge thereof of such county, or before the court or judge thereof of the county where such person resides or may be found. In the latter case, a certified copy of the written interrogatories, if any, and the examination or other proceeding thereon or connected therewith, shall be filed with the clerk of the court where administration is granted.

Sec. 1091. If the person so cited refuse to appear, or to answer such interrogatories as may be allowed to be put to him, touching the matter charged, he may be punished for a contempt, or may at once be committed, by the warrant of the judge to the county jail there to remain in close custody until he submits to the order of the court or judge.

Sec. 1092. The court or judge thereof, upon the application of the executor or administrator, may cite any person who has been entrusted with any of the property of the deceased, to appear and answer concerning the same, when it appears probable that such person refuses or neglects to render to the executor or administrator a true account thereof. The application shall be made and the proceeding conducted in the manner prescribed in sections 1089, 1090, and 1091 concerning property or writings alleged to be concealed, and with like effect.

SEC. 1093. If any person shall, before administration is granted, embezzle, alien or in any way convert to his own use, any of the property of a deceased person, he is liable to the executor or administrator, in double the amount of damages which may be assessed therefor.

TITLE IV.

The support of the widow and minor children.

SEC. 1094. Provision for widow or minor children before administration is granted.
1095. Property to be set apart, and effect of.
1096. Further order for support, when made.
1097. When the whole of estate to be set apart to widow and children.
1098. When estate all to be deemed assets.

SEC. 1094. Until administration of the estate has been granted and the inventory filed, the widow and minor children of the deceased, are entitled to remain in the possession of the homestead, all the wearing apparel of the family, and household furniture of the deceased, and also to have a reasonable provision for their support, during such period, to be allowed by the court or judge thereof.

SEC. 1095. Upon the filing of the inventory, the court or judge thereof, shall make an order, setting apart, for the widow or minor children of the deceased, if any, all the property of the estate, by law exempt from execution. The property thus set apart, if there be a widow, is her property, to be used or expended by her in the maintenance of herself and minor children, if any; or if there be no widow, it is the property of the minor child; or if more than one, of the minor children in equal shares; to be used or expended in the nurture and education of such child or children, by the guardian thereof as the law directs.

SEC. 1096. If the property so exempt, is insufficient for the support of the widow and minor children, according to their circumstances and condition in life, for one year after the filing of the inventory, the court or judge thereof may order that the executor or administrator pay to such widow, if any, and if not, then, to the guardian of such minor children an amount sufficient for that purpose; but such order shall not be made unless it appear probable that the estate is sufficient to satisfy all the debts and liabilities of the deceased and pay the expenses of administration in addition to the payment of such amount.

SEC. 1097. If, from the inventory of an intestate's estate, who died leaving a widow or minor children, it appears that the value of the estate does not exceed one hundred and fifty dollars over and above property exempt from execution, upon the filing of the inventory the court or judge thereof shall make a decree providing, that the whole of the estate, after the payment of funeral expenses and expenses of administration, be set apart, for such widow or minor children, in like manner and with like effect, as in case of property exempt from execution. There shall be no further proceeding in the administration of such estate, unless further property be discovered.

SEC. 1098. If an intestate leave neither widow or minor children, all the property of the estate is assets in the hands of the administrator, for the payment of funeral expenses, expenses of administration, payment of the debts of the deceased, or distribution according to law.

TITLE V.

Claims against the estate.

SEC. 1099. Publication of notice by executor administrator and contents thereof.
1100. Proof of publication, effect of not presenting claim according to notice.
1101. Claim, how presented, and verification of.
1102. Claim to be allowed or rejected, if barred not to be allowed.
1103. Effect of judgment against executor or administrator.
1104. Judgment against deceased in his life time.
1105. When and how claim may be referred.
1106. Proceeding by referee, and effect of.
1107. Claim of executor or administrator.
1108. Such claim may be determined on the settlement of final account.

SEC. 1099. Every executor or administrator, shall, immediately after his appointment, publish a notice thereof, in some newspaper published in the county, if there be one, or otherwise, in such paper as may be designated by the court or judge thereof, as often as once a week, for four successive weeks, and oftener if the court or judge shall so direct. Such notice shall require all persons having claims against the estate, to present them, with the proper vouchers, within six months from the date of such notice, to the executor or administrator, at a place within the county therein specified.

SEC. 1100. Before the expiration of the six months mentioned in the last section, a copy of the notice as published, with the proper proof of publication, shall be filed with the clerk. A claim not presented within six months after the first publication of the notice, is not barred, but it cannot be paid until the claims presented within that period have been satisfied; and if the claim be not then due, or if it be contingent, it shall nevertheless be presented as any other claim. Until the administration has been completed, a claim against the estate not barred by the statute of limitations, may be presented, allowed and paid out of any assets then in the hands of the executor or administrator not otherwise appropriated or liable.

SEC. 1101. Every claim presented to the executor or administrator, shall be verified by the affidavit of the claimant, or some one on his behalf, who has personal knowledge of the facts, to the effect that the amount claimed is justly due, that no payments have been made thereon, except as stated, and that there is no just counter-claim to the same to the knowledge of the affiant. When it appears or is alleged that there is any written evidence of such claim the same may be demanded by the executor or administrator, or that its non-production be accounted for.

SEC. 1102. When a claim is presented to the executor or administrator, as prescribed in the last section, he shall indorse upon it his allowance or rejection, with the date thereof; and if he allow it, shall pay it in due course of administration. No claim shall be allowed by the executor or administrator which is barred by the statute of limitations.

SEC. 1103. The effect of a judgment or decree against an executor or administrator, on account of a claim against the estate of his testator or intestate, is only to establish the claim, as if it had been allowed by him, so as to require it to be satisfied in due course of administration, unless it appear that the complaint alleged assets in his hand applicable to the satisfaction of such claim, and that such allegation was admitted or found to be true, in which case the judgment or decree may be enforced against such executor or administrator personally.

SEC. 1104. A claim established by judgment or decree against the deceased in his life time, need not be verified by affidavit, but it is sufficient to present a certified copy of the judgment docket thereof, to the executor or administrator for allowance or rejection, as in other cases; but this section is not to be construed to prevent an execution from being issued upon such judgment or decree as elsewhere provided in this code.

SEC. 1105. If the executor or administrator doubt the validity of any claim presented to him, he may agree in writing with the claimant that an order of reference be made by the court or judge thereof, concerning the same. Upon the filing of such agreement, such court or judge shall make the order accordingly.

SEC. 1106. The referee shall proceed to hear and determine the matter, and report thereon to the court, where the order of reference was made, in the same manner and with like effect as if the order was made in an action or suit upon such claim.

SEC. 1107. If the executor or administrator is himself a creditor of the testator or intestate, his claim, duly verified, may be presented to the court or judge thereof, for allowance or rejection, but the allowance of such claim by such court or judge, does not conclude a creditor, heir or other person interested in the estate, in any action, suit or proceeding between such executor or administrator, and such creditor, heir or other person.

SEC. 1108. If the court or judge thereof, reject the claim of the executor or administrator, either in whole or in part, or in case the same is not presented for allowance as provided in the last section, the executor or administrator may retain the amount thereof until the final settlement of his accounts, when, if the same is controverted or objected to by any person interested in the estate, the right of the executor or administrator to have the allowance claimed, shall be tried and determined by the court. If the claim is not presented to the court or judge, as provided in section 1107, before it is barred by the statute of limitations, such claim cannot be allowed, retained or recovered.

TITLE VI.

Sale of property by executors or administrators.

SEC. 1109. Sale of property, how made, and application therefor.
1110. Order of sale of personal property.
1111. Sales of property thereunder, and manner thereof.
1112. Personal property may be sold at private sale. Articles of, specially bequeathed.
1113. When real property may be sold, where same specially bequeathed.

Sec. 1114. Petition for order of sale of real property, what shall contain.
1115. Citation to heirs and devisees, to shew cause.
1116. Service of citation.
1117. Hearing and order of sale.
1118. Sale, how made, security for purchase money, how taken.
1119. Return of sale, and objections thereto.
1120. When sale confirmed and when vacated.
1121. Recitals in conveyance, and effect thereof.
1122. When real estate may be sold to pay legacy, or exempt specific bequest from sale.
1123. Sale of property under will.
1124. Proceeding in case property appropriated insufficient.
1125. Bequests and legacies when liable for debts.
1126. Sale of contract for the purchase of real property.
1127. Sale subject to payments to be made on contract. Undertaking of purchaser in relation thereto.
1128. Assignment of contract and effect thereof.
1129. Order to redeem mortgaged property.
1130. Order for the sale of mortgaged property.
1131. Order making application of proceeds of sale of mortgaged property.
1132. Certain sections not to include mortgage foreclosed, or where suit has been commenced for that purpose.
1133. When debt not due, how satisfied.
1134. Effect of order of confirmation of sale. Purchase by executor or administrator void.
1135. When executor or administrator may avoid fraudulent or void conveyances or judgments of the deceased.
1136. Order allowing proceedings therefor.
1137. Disposition of property recovered on such proceeding.

Sec. 1109. No sale of the property of an estate is valid unless made by order of the court or judge thereof, as in this title prescribed, unless herein otherwise provided. The application for an order of sale shall be by the petition of the executor or administrator, and in case of real property, a citation to the heirs and others interested in such property.

Sec. 1110. Upon the filing of the inventory or at the next term of court, the executor shall make an application to sell the personal property of the estate, or so much thereof as may be necessary to pay the funeral charges, expenses of administration and the claims, if any, against the estate; and it shall be the duty of the court or judge to grant such order, and to direct and prescribe therein the terms of sale upon which such property shall be sold, whether for cash or on credit, or both.

Sec. 1111. Thereafter, the executor or administrator shall sell such personal property from time to time for the purposes specified in the last section, and as often and as much thereof as may be necessary. Such sale shall be conducted in the same manner as a sale of personal property on execution, unless otherwise provided in this title.

Sec. 1112. If upon the application for an order of sale, or upon a subsequent application for that purpose, it appears to the court or judge that it would be for the interest of the estate, it may order that the executor or administrator may sell all the personal property of the estate or any article thereof at private sale. If any articles of personal property have been specially bequeathed, they are to be exempt from the operation of the order of sale, so long as any property of the estate not specially devised or bequeathed, remains unsold, or appropriated to the purposes specified in section 1110.

SEC. 1113. When the proceeds of the sale of personal property have been exhausted, and the charges, expenses and claims specified in section 1110 have not all been satisfied, the executor or administrator shall sell the real property of the estate or so much thereof, as may be necessary for that purpose. If any of such real property have been specially devised, it shall be exempt from the operation of the order of sale, in the same manner as personal property specially bequeathed.

SEC. 1114. The petition for the order of sale of real property, shall state the amount of the sales of personal property, the charges, expenses and claims still unsatisfied so far as the same can be ascertained, a description of the real property of the estate, the condition and probable value of the different portions or lots thereof, the amount and nature of any liens thereon, the names, ages and residence of the devisees, if any, and of the heirs of the deceased, so far as known.

SEC. 1115. Upon the filing of the petition, a citation shall issue to the devisees and heirs therein mentioned and to all others unknown, if any such there be, to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause if any exist, why an order of sale should not be made as in the petition prayed for.

SEC. 1116. Upon an heir or devisee, known, and resident within this state, such citation shall be served and returned as a summons, and upon an heir or devisee unknown, or non-resident, it may be served by publication, not less than four weeks, or for such further time as the court or judge may prescribe. When service of the citation is made by publication, there shall be published with it a brief description of the property described in the petition.

SEC. 1117. If upon the hearing, the court find that it is necessary that the real property or any portion thereof should be sold, it shall make the order accordingly and prescribe the terms thereof, whether of cash or credit, or both; and if the court find that such property cannot be divided without probable injury and loss to the estate, it may order that it, or any specific lot or portion thereof shall be sold wholly, whether otherwise necessary or not.

Sec. 1118. Upon the order being made, the executor or administrator shall sell the property therein specified upon the terms therein directed, and in the manner herein otherwise provided. Such sale shall be made in the same manner as like property is sold on execution. When the sale is upon credit, the executor or administrator, shall take the note of the purchaser for the purchase money, with a mortgage upon the property to secure the payment thereof.

Sec. 1119. At the term of court next following the sale of real property, the executor or administrator, shall make a return of his proceedings concerning such sale. At such term any of the persons cited to appear on the application for the order of sale may file his objections to the confirmation of such sale.

Sec. 1120. Upon the hearing the court shall confirm the sale and decree that the executor or administrator make a conveyance to the purchaser, unless it appear that there were irregularities in the sale, or that the sum bidden for the property is disproportionate to the value thereof, and that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained therefor, in either of which cases the court shall make an order vacating the sale and directing that the property be resold; and upon such second sale, the property or any specific portion or lot thereof ordered to be re-sold, shall be sold as if no previous sale had taken place. In case no objections are made to the confirmation of the sale as provided in section 1119, the court shall nevertheless examine the proceedings concerning such sale, and if it appear proper, may make the order of resale provided for in this section in the same manner and with like effect as if objections had been filed thereto.

Sec. 1121. A conveyance executed by the executor or administrator shall set forth the original order of sale and the order confirming the same and directing the conveyance, and shall operate to convey all the estate right and interest of the testator or intestate in the premises at the time of his death.

Sec. 1122. When a testator shall have specially bequeathed any specific article of personal property, or given any legacy by will, and there shall not be sufficient personal property, besides such specific article, or the value of such legacy, to pay the funeral charges, expenses of administration, and claims against the estate, the executor or administrator shall obtain an order to sell the real property sufficient to make up the deficiency, in the manner hereinbefore provided.

SEC. 1123. When the testator shall make provision in his will for the sale or disposition of all, or any particular portion of his estate, for the payment of funeral charges, expenses of administration, or of claims against the estate, the property so appropriated may be sold or disposed of as directed by the executor or administrator with the will annexed, without an order of the court therefor; but he shall be bound to conduct the sale, and make a return thereof in all respects, as if it were made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he shall be governed by such directions in such respects.

SEC. 1124. If the provision made by the will, or the property thereby appropriated, be insufficient for the purpose intended, the remaining portion of the estate may be sold for that purpose according to the provisions of this title.

SEC. 1125. The property, real and personal, given by the will to any devisee or legatee, is liable for the payment of the funeral charges, expenses of administration, and of claims against the estate, and if there be more than one such devisee or legatee, then in proportion to the value or amount of the several devises or legacies; except that specific devises and legacies shall be exempt from such liability, if such appear to have been the intention of the testator, and there be other sufficient property to satisfy such charges, expenses and claims.

SEC. 1126. If the deceased was, at the time of his death, a party to a contract for the purchase of real property, his interest in such real property by virtue of such contract, may be sold in the same manner, as if such contract had been executed in the life time of the deceased by a conveyance to him of such property according to the legal effect and terms of such contract.

SEC. 1127. If there be any payments due or to become due on such contract to the vendor of the deceased, the sale is made subject thereto, and before the same can be confirmed or the contract assigned to the purchaser, such purchaser shall execute an undertaking with one or more sufficient sureties, in an amount not less than double the value of all the payments then due or to become due, for the benefit of whom it may concern, to be void upon the condition that such purchaser will make all such payments according to the terms of such contract, and indemnify the executor or administrator or others whom it may concern, against all damages, costs and expenses, by reason of any covenant or agreement contained in such contract.

SEC. 1128. The order of confirmation of such sale shall direct the executor or administrator to make an assignment of such contract to the purchaser, which assignment shall vest in the purchaser, his heirs and assigns, all the estate, right and interest of the deceased at the time of his death in such real property; and give to the purchaser the same rights and remedies against the vendor thereof, as the deceased would have had or been entitled to, if living.

SEC. 1129. If the deceased left any property real or personal, under mortgage, and did not devise or provide for the redemption of the same by will, the court or judge thereof upon the application of the executor or administrator, or the application of an heir or creditor or other person interested in the estate, may order the executor or administrator to redeem such property out of the proceeds of the other personal property; if it appear that such redemption would be for the interest of the estate, and not prejudicial to creditors.

SEC. 1130. If upon such application such redemption be deemed not proper, or inexpedient, the court shall order such property to be sold in like manner and with like effect, as is provided in other cases of the sale of real property by this title; and the conveyance to the purchaser shall operate to convey to him all the estate, right and interest, which the deceased would have had in the property, had not the same been mortgaged by him.

SEC. 1131. Ten days before making an order for the application of the proceeds of such sale, the mortgagee or other person to whom the debt which is secured by such mortgage is payable shall be cited to appear and show the amount of his debt and make his objections if any to the report of the expenses of the proceeding and sale as claimed by the executor or administrator, and thereupon the court shall order that the proceeds of the sale, be first applied to be payment of the proper expenses of the proceeding and sale, and secondly to the satisfaction of such debt, and the residue, if any, in due course of administration.

SEC. 1132. Sections 1129, 1130 and 1131, shall not be construed to include a mortgage which has been foreclosed or upon which a suit has been commenced for foreclosure, before the application for the order of redemption or sale is made, nor to any other lien arising upon judgment or decree given against the deceased in his life time.

SEC. 1133. If the debt secured by the mortgage mentioned in section 1129, be not due at the time of the making of the order for redemption or application of the proceeds of sale, the party to whom it is payable shall be entitled to receive in satisfaction thereof such sum as may be ascertained to be equal to the present value thereof.

SEC. 1134. The order of confirmation of sale in this title mentioned, is conclusive as to the regularity of the sale, and no further. All purchases of the property of the estate by an executor or administrator, however made, whether directly or indirectly, are prohibited; and if made, are void.

SEC. 1135. Whenever the assets of the estate are insufficient to satisfy the funeral charges, expenses of administration, and the claims against the estate, and the deceased shall in his life time have made or suffered any conveyance, transfer, or sale of any property real or personal, or any right or interest therein, with intent to delay, hinder or defraud creditors, or when such conveyance, transfer or sale has been so made or suffered, that the same is void in law as against creditors, or when the deceased in his life time, has suffered, consented, or procured any judgment or decree to be given against him with such intent, or in such manner as to be likewise void, it is the duty of such executor or administrator to make application by petition to the county court or judge thereof, for leave to commence and prosecute to final judgment or decree, the necessary and proper actions, suits or proceedings, to have such conveyance, transfer, sale, judgment or decree, declared void, and the property affected thereby, discharged from the effect thereof.

SEC. 1136. If upon the application it appear to such court or judge that the assets are insufficient for the purposes specified in the last section, and that it is probable that the conveyance, transfer, judgment, or decree was made, suffered, consented to, or procured with the intent or in the manner specified in the last section, it shall make the order directing the proceedings to be commenced and prosecuted as to any or all of the matters alleged in the petition and necessary to supply the deficiency in the assets.

SEC. 1137. The property recovered by means of any proceeding in pursuance of the last two sections, is to be sold and appropriated to supply the deficiency mentioned in section 1134, in the same manner as other like property, but the right to, or interest in, the surplus, if any, remains as if such proceeding had not been allowed or commenced.

TITLE VII.

Accounts of executors and administrators.

SEC. 1138. When filed, and what to contain.
1139. Proceeding if administrator neglect to file an account.
1140. Order for the payment expenses, charges and claims.
1141. Final account, when filed and what to contain.
1142. Objections to final account, by whom and when made.
1143. Decree upon final account and effect thereof.
1144. Administrator with the amount of inventory.
1145. For what he is responsible. Either of increase or decrease of the estate.
1146. Expenses and compensation of administrator.
1147. Same subject.
1148. Amount of compensation.
1149. Proceeding in a case of neglect to file final account.
1150. Administrator may compound for debt due estate.

SEC. 1138. An executor or administrator shall within six months from the date of the notice of his appointment, and every six months thereafter, until the administration is completed, and he is discharged from his trust, render an account verified by his own oath and file the same with the clerk, showing the amount of money received and expended by him, from whom received and to whom paid, with the proper voucher for such payments; the amount of the claims presented against the estate, and allowed or disallowed, and the name of the claimants of each, and any other matter necessary to shew the condition of the affairs thereof.

SEC. 1139. An executor or administrator who shall fail to file an account as required in the last section, may be required by a citation ordered by the court or judge to appear and do so, either upon the application of an heir or creditor or other person interested in the estate, or without it. If the executor or administrator refuse or neglect to appear when cited, or to file the account as required, he may be punished for a contempt, or by warrant of the judge be committed at once to close custody in the jail of the county until he consent to do so.

SEC. 1140. At the first term of the court after the filing of the first semi-annual account and each semi-annual account thereafter, the court shall ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed by the executor or administrator within the first six months or any succeeding period of six months thereafter, after the date of the notice of his appointment, after paying the funeral charges, and expenses of administration, and if so, it shall so order and direct, but if the estate be insufficient for that purpose, it shall ascertain what per cent. of such claims it is sufficient to satisfy, and order and direct accordingly.

SEC. 1141. When the estate is fully administered, it shall be the duty of the executor or administrator to file his final account. Such account shall be verified by his own oath, and contain a detailed statement of the amount of money received and expended by him, from whom received and to whom paid and refer to the vouchers for such payments, and the amount of money and property, if any, remaining unexpended or appropriated. Upon the filing of the final account the court or judge thereof shall make an order directing notice thereof to be given in the same manner as the notice of an appointment of an executor or administrator, and appoint a day at some term subsequent thereto for the hearing of objections to such final account and the settlement thereof.

SEC. 1142. Any heir, creditor or other person interested in the estate, may on or before the day appointed for such hearing and settlement file his objections thereto, or to any particular item thereof, specifying the particulars of such objections; but no creditor shall be allowed to object to such account, whose claim has been satisfied as allowed by the executor or administrator, or established by judgment or decree.

SEC. 1143. Upon the hearing the court shall give a decree allowing or disallowing the final account either in whole or in part as may be just and right, and such decree in any other action, suit or proceeding between the parties interested or their representatives is primary evidence of the correctness of the account, as thereby allowed and settled.

SEC. 1144. An executor or administrator, is chargeable in his account with all the property of the estate which may come into his possession, at the value of the appraisement contained in the inventory, except as in this title otherwise provided.

SEC. 1145. He shall not make profit by the increase in value of the property of the estate; nor suffer loss for the decrease in value or the destruction thereof, without his fault; and if any of the property of the estate sell for more than its appraised value, he shall account for the excess, and if any such property sell for less than its appraised value, he shall not be responsible for the loss, unless occasioned by his fault. He shall not be accountable for the debts due the estate, if it appear that they remain uncollected without his fault. He shall not purchase any claim against the estate which he represents, and if he satisfies any such claim for less than its nominal value, he is only entitled to charge in his account the sum actually paid.

Sec. 1146. An executor or administrator shall be allowed in the settlement of his account, all necessary expenses incurred in the care, management and settlement of the estate, including reasonable attorney fees in any necessary litigation, or matter requiring legal advice or counsel. For his services, he shall receive such compensation as the law provides; but when the deceased by his will, has made special provision for the compensation of his executor, such executor is not entitled to any other compensation for his services, unless he shall within ten days after his appointment, subscribe and file with the clerk a written declaration renouncing the compensation provided by the will.

Sec. 1147. Notwithstanding the provision in the will for the compensation of an executor, if the estate be insufficient to satisfy the claims against it, the court shall reduce such compensation, so far as may be necessary to satisfy such claims, to an amount equal to what the executor would have been entitled, if no such provision had been made.

Sec. 1148. The compensation provided by law for an executor or administrator is a commission upon the whole estate accounted for by him as follows:

1. For the first thousand dollars, or any less sum, at the rate of seven per cent. thereof;

2. For all above that sum and not exceeding two thousand dollars, at the rate of five per cent. thereof;

3. For all above two thousand and not exceeding four thousand dollars, at the rate of four per cent. thereof;

4. For all above the last mentioned sum, at the rate of two per cent. thereof.

In all cases such further compensation as is just and reasonable, may be allowed by the court or judge thereof, for any extraordinary and unusual services, not ordinarily required of an executor or administrator in the discharge of this trust.

SEC. 1149. Before the time appointed for the hearing and settlement of a final account, the executor or administrator shall file with the clerk a copy of the notice thereof, with the proper proof of its publication as directed. An executor or administrator who shall fail to file his final account as provided in section 1141, may be proceeded against in like manner, and with like effect as provided in section 1139, in case of failure to file a semi-annual account.

SEC. 1150. Whenever a debtor of a deceased person is unable to pay all his debts, an executor or administrator, by order of the court or judge thereof, may compound with him and give him a discharge upon receiving a fair and just proportion of his effects; but if such compounding is procured or induced by the fraudulent representations or conduct of such debtor, such payment shall only operate to discharge a like amount of the debt.

TITLE VIII.

Payment of claims and charges.

SEC. 1151. Order of payment of charges and claims.
1152. Proceeds of real property to be applied in satisfaction of lien.
1153. How judgment or decree may be satisfied, when given in life time of deceased.
1154. If estate insufficient payment to be in proportion.
1155. Funeral charges, who may incur them, and when allowed.
1156. Administrator may retain compensation and expenses.
1157. Debts not due or contingent how paid.
1158. Administrator liable to creditor personally, when.
1159. Distribution and payment of legacies when decreed.
1160. When real estate discharged from administration.
1161. Application of heir or other person for share of estate.
1162. Notice, and proceedings thereon.
1163. Qualifications of sureties in undertaking, and costs.
1164. Application for decree to refund.
1165. Proceedings thereon, and how decree enforced.

SEC. 1151. The charges and claims against the estate which have been presented and allowed, or presented and disallowed, but subsequently established by judgment or decree, within the first six months after the date of the notice of appointment of the executor or administrator, shall be paid in the following order, and those presented and allowed or established in like manner within each succeeding period of six months thereafter, during the continuance of the administration, in the same manner:

1. Funeral charges;
2. Taxes of whatever nature due the United States;
3. Expenses of last sickness;
4. Taxes of whatever nature due the state, or any county or other public corporation therein;
5. Debts preferred by the laws of the United States;
6. Debts which, at the death of the deceased, were a lien upon his real property or any right or interest therein according to the priority of their several liens;
7. All other claims against the estate.

SEC. 1152. The preference given by subdivision 6 of the last section, shall only extend to the proceeds of the property upon which the lien exists, and as to such proceeds such debt is to be preferred to any of the classes mentioned in such section, other than the taxes upon such property.

SEC. 1153. If such debt has been established by judgment or decree against the deceased in his life time, such judgment or decree, if the proceeds of the personal property be not sufficient to satisfy it, may, in the discretion of the court or judge thereof, be either satisfied from the proceeds of the sale of the property, by the executor or administrator, upon which it is a lien, or enforced by execution against such property. Such sale by the executor or administrator discharges the property from the lien of the judgment or decree, but the same attaches to the proceeds thereof, after deducting therefrom the expenses of sale.

SEC. 1154. Except as specially provided in the last three sections, if the estate be insufficient to pay all the claims and charges of any one class, payable within any period of six months during the administration as provided in section 1151, each creditor of such class shall be paid in proportion to the amount of his claim, and not otherwise.

SEC. 1155. The executor named in the will, or if there be none or if he do not attend to it, then the husband, widow, or next of kin, in the order herein named, are authorized to incur funeral charges on account of the estate in the burial of the deceased, before administration of the estate is granted; and the burial of the deceased may be in a manner and at a cost, according to his circumstances and condition in life, but no funeral charges, except those necessary to give the deceased a plain and decent burial, shall be allowed out of the estate, where the assets are not sufficient to satisfy all other claims against it, including legacies and devises, if there be any.

SEC. 1156. The executor or administrator may retain in his hands, in preference to any claim or charge against the estate, the amount of his own compensation and the necessary expenses of administration.

SEC. 1157. A debt, due and payable, is not entitled to preference over one of the same class not due, if the latter be presented within the same period. A debt not due whether contingent or absolute, upon being presented, shall, if absolute be satisfied by the payment of such sum as the court or judge thereof may prescribe by order to be equal to its present value, and if contingent, by the payment into court, for the benefit of the creditor subject to the contingency, of a sum, to be ascertained in like manner, equal to its present value.

SEC. 1158. When upon the filing of a semi-annual account, an order is made determining and prescribing the amount of assets applicable to the claims then presented, as provided in section 1140, thereafter the executor or administrator is personally liable to each creditor included in such order, for such amount.

SEC. 1159. If all the charges and claims shall have been satisfied upon the first distribution of the assets, or as soon thereafter as they may be, the court or judge thereof shall direct the payment of legacies and the distribution of the remaining proceeds of the personal property among the heirs or other persons entitled thereto.

SEC. 1160. The real property of the deceased is the property of those to whom it descends by law or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as by this chapter provided; but upon the settlement of the estate, and the termination of the administration thereof, so much of such real property as remains unsold or unappropriated, is discharged from such possession and liability without any order or decree therefor, but if there be any surplus of the proceeds of the sale of such real property, or any part thereof, the court or judge thereof shall order and direct a distribution of such surplus among those who would have been entitled to such land if the same had not been sold.

SEC. 1161. At any time after the filing of the first semi-annual account, any heir, devisee or legatee, may apply to the court by petition, for an order that he have the possession and rents and profits thereof of the portion of the real property to which he may be entitled, and that payment be made to him of his legacy or distributive share of the personal property of such estate, as the case may be.

SEC. 1162. Notice of the application shall be given to the executor or administrator ten days before the term at which it is made. If upon the hearing it appear that the estate is but little in debt, the court in its discretion may grant the petition or some part thereof, upon the condition that such applicant file with the clerk within a time in the order specified, an undertaking with one or more sufficient sureties for the benefit of whom it may concern, in a sum double the value of such real property, legacy, or distributive share, to be void upon the condition that such heir, legatee or devisee, will pay, when required, his proportion towards satisfying any claim against the estate.

SEC. 1163. The sureties in such undertaking shall have the same qualifications as sureties in bail upon arrest, and shall justify before the court or judge thereof in like manner. The costs of the proceeding shall be paid by the applicant.

SEC. 1164. If after the giving of such undertaking it shall become necessary to satisfy any claim against the estate to require the payment of all or any part of the sum therein specified it shall be the duty of the executor or administrator to apply by petition to the court for a decree to that effect. Notice of the application shall be given to the party filing the undertaking, ten days before the term at which the application is made.

SEC. 1165. If upon the hearing, it appear necessary and proper that such payment should be made the court shall decree accordingly, specifying therein the amount to be paid, and within what time; and if the amount be not paid within the time specified, the decree may be enforced against such party and the sureties in the undertaking by execution, in the same manner as a decree in the circuit court.

CHAPTER XVI.

Sec. 1166. Style of process.	1167. When act takes effect.

Sec. 1166. All process authorized by this code, to be issued by any court or officer thereof, shall run in the name of the State of Oregon, and be signed by the officer issuing the same, and if such process be issued by a clerk of a court he shall affix thereto his seal of office. In all actions suits or proceedings by or against the State, it is to be styled the State of Oregon.

Sec. 1167. This act shall take effect from and after a day to be appointed by the governor, when the same is printed and distributed, and notice thereof shall be given by the governor, by proclamation published in three weekly newspapers in this State for three weeks before the day appointed for the same to take effect.

Passed the House of Representatives October 10, 1862.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

Approved October 11, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

GENERAL LAWS OF OREGON.

[REPORTED BY CODE COMMISSION.]

An act providing for private incorporations and the appropriation of private property therefor.

PRIVATE INCORPORATIONS.

General provisions.

Sec. 1. Three or more persons may incorporate themselves.
2. Articles of incorporation how made and filed.
3. Articles to be evidence of corporation's existence.
4. Articles, what they shall contain.
5. Corporations, what are their powers.
6. Corporations to receive stock, and call meeting for directors.
7. Corporators to be inspectors of election, and who may vote.
8. Qualifications of directors.
9. Power of directors.
10. Notice of meeting of stockholders.
11. When directors elected. Majority may act.
12. Corporations to keep stock-book.
13. Stocks to be treated as personal property.
14. Effect of sale of stocks.
15. When directors liable for debts.
16. Effect of non user of corporate powers.
17. Corporation may continue after dissolution.
18. Special incorporations may incorporate themselves under this act, and effect of.
19. Supplementary articles of incorporation.
20. Corporations for navigating streams, may build roads across portages, who are prohibited from taking stock in corporation to build road.

Be it enacted by the Legislative Assembly of the State of Oregon as follows:

Section 1. Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act.

Sec. 2. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgement of a deed; and file one of such articles in the office of the Secretary of State, another with the clerk of the county where the enterprise, business, pursuit or occupation, is proposed to be carried [illegible], or the principal office or place of business is proposed to be located, and retain the third in the possession of the corporation.

SEC. 3. The articles of incorporation, or a certified copy of the one filed with the secretary of state, or the county clerk, is evidence of the existence of such corporation.

SEC. 4. The articles of incorporation shall specify:

1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation, if limited;
2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage;
3. The place where the corporation proposes to have its principal office or place of business;
4. The amount of the capital stock of the corporation;
5. The amount of each share of such capital stock;
6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road, canal, or the site of such bridge.

SEC. 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators; and authorized to carry into effect the object specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns, by the name assumed in such articles, shall thereafter be deemed a body corporate with power:

1. To sue and be sued;
2. To contract and be contracted with;
3. To have and use a corporate seal, and the same to alter at pleasure;
4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient, to carry into effect the object of the incorporation;
5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation.
6. To make by-laws, not inconsistent with any existing law, for the transfer of its stock, the management of its property, and the general regulation of its affairs.

SEC. 6. The corporators, or any portion of them, designated by a majority of the whole number, are authorized to open books and receive subscriptions to the capital stock of the corporation, and as soon as such capital stock has been subscribed, they shall give notice to the subscribers to meet at such time and place as they may designate, for the purpose of electing, not less than three, nor more than seven directors, as the stockholders present shall determine.

SEC. 7. The corporators present at such meeting, shall be inspectors of the election, and certify who are elected directors, and appoint the time and place for their first meeting; and each stockholder who shall attend in person, or by proxy, appointed by writing, and subscribed by such stockholder, shall be entitled to one vote for each share of capital stock subscribed by him; but after such first election of the directors, no person shall vote on any share, upon which any instalment, or portion thereof, is then due and unpaid.

SEC. 8. No person is eligible to the office of director, unless he is a stockholder in the corporation, and resident of the state, and a director ceasing to be such stockholder or resident, ceases to be a director. Before entering upon the discharge of their duties, the directors shall each take and subscribe an oath, to faithfully and honestly discharge such duties.

SEC. 9. The directors, when elected and qualified, at the first meeting thereafter, shall elect one of their number president, who shall preside at their meetings, and perform such other special duties as the directors may authorize, and at the same time shall appoint a secretary, whose duty it shall be to keep a fair and correct record of all the official business of the corporation. From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise specially provided in this act.

SEC. 10. The notice of the time and place of the first meeting of the stockholders for the election of directors, shall be given by publication of the same for thirty days before such meeting in some newspaper, published at least once a week, in the county where the meeting is to be held, or in some newspaper published in like manner, and in general circulation therein. All notices of subsequent meetings of stockholders or directors, shall be given for such time and in such manner as the directors may prescribe.

SEC. 11. There shall be an annual election of directors, and at each election after the first, the president of the corporation shall act as inspector of election, and certify who are elected directors. The directors chosen shall hold their offices for one year thereafter, and until their successors are elected and qualified. The powers vested in the directors may be exercised by a majority of them.

SEC. 12. Every corporation organized under this act, shall keep a stock-book, in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof, which stock-book, or a certified copy thereof, as to the items in this section specified, shall be subject to the inspection, at all reasonable hours, of any person interested therein, and applying therefor.

SEC. 13. The stocks in all private corporations organized under this act, are to be deemed personal property, and subject to attachment, execution, levy and sale, as such; and the corporation in case of such sale, is required to make the necessary transfer to the purchaser, upon the stock book.

SEC. 14. All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder, or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance, due, or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser.

SEC. 15. If the directors of a corporation declare and pay dividends, when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation, then existing, or incurred while they remain in office; or if such directors shall, by any official act or conduct, fraudulently induce any person to give credit to such corporation, they shall be liable in like manner to such person for any loss he may sustain thereby; but any director who voted against such dividend, or such fraudulent act or conduct, if present, or who thereafter as soon as the same came to his knowledge, filed his objections thereto, shall be exempt from such liability.

SEC. 16. Any corporation organized under this act, which does not elect directors and commence the transaction of the business for which it was formed, within one year from the time of the filing of the articles of incorporation, shall thenceforth be divested of its corporate powers, and if such corporation shall, for any period of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease.

SEC. 17. All corporations that expire by the limitation specified in their articles of incorporation, or are annulled for forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for the period of five years thereafter, if necessary, for the purpose of prosecuting or defending actions, suits or proceedings, by or against them, settling their business, disposing of their property, and dividing their capital stock; but not for the purpose of continuing their corporate business.

SEC. 18. The stockholders of any private incorporation heretofore incorporated by any special act of the legislature, may at any time hereafter, while such corporation exists, incorporate themselves under this act in the mode herein prescribed, for the purpose of carrying on the enterprise, business, pursuit, or occupation, for which they may have been specially incorporated; and the filing of the articles of incorporation shall be deemed a surrender of such special incorporation, but not of any vested right thereunder, and thereafter such corporation shall have the powers and privileges, and be subject to the liabilities and limitations provided by this act, and not otherwise.

SEC. 19. Any corporation organized under the provisions of this act, may make and file supplementary articles of incorporation, to be subscribed by the then stockholders of the corporation, for the purpose of increasing or diminishing the capital stock of such incorporation, or the amount of the shares thereof, or for the purpose of dissolving such corporation, and settling its business, and disposing of its property, and dividing its capital stock, *provided*, however, that the capital stock of any corporation formed under this act, except corporations formed for the purpose of making and constructing a railroad, shall never exceed the sum of two million of dollars, and any corporation that shall violate this provision of this act shall forfeit its corporate rights.

SEC. 20. Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railroad, macademized road, plank road, or clay road, or canal or bridge, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream or other water in like manner and with like effect, as if such corporation, had been specially formed for such purposes, but no corporation formed under this act, or heretofore or hereafter incorporated by any special act of incorporation, passed by the legislative assembly of this state, or otherwise for the purpose of navigating any stream or other water of this state, or forming the boundary thereof in whole or in part, nor any stockholder in such corporation, shall ever take or hold stock, or any interest directly or indirectly in the stock of any corporation which may be formed under this act, for the purpose of building or constructing any road in this act mentioned; nor shall any such corporation ever purchase, lease or in any way control such road or the corporate rights of such last named corporation: provided, further, that corporations heretofore incorporated, or which may hereafter be formed under this act for the purpose of establishing and keeping a ferry across any stream or other water of this state, or forming the boundary thereof, in whole or in part, shall not be deemed a corporation for the purpose of navigating such stream or water, within the meaning of this act, nor shall the stockholders thereof be restrained from taking or holding stock in a corporation formed under this act for the purpose of constructing or building any road.

PRIVATE CORPORATIONS.

TITLE I.

Appropriation of land by corporations.

SEC 21. Corporations may enter upon lands to make selections
22. What lands may be appropriated.
23. When corporation may change route of road.
24. How public highways or grounds may be appropriated.
25. How road located in towns.
26. When corporation may erect gate in town and when not.
27. Width of road and track.
28. Bridges across streams. When ferries may be put on.
29. Roads when completed to be common highway.
30. When tolls may be collected on road.
31. Effect of not paying, or overcharging toll.
32. Bridge to be common highway.
33. When tolls may be collected on bridge.
34. Corporation to construct railroad or canal to be common carriers.

SEC. 21. A corporation organized for the construction of any railroad, macadamized road, plank road, clay road, canal or bridge shall have a right to enter upon any land between the termini thereof, for the purpose of examining, locating and surveying the line of such road or canal, or the site of such bridge, doing no unnecessary damage thereby.

SEC. 22. Such corporation may appropriate so much of said land as may be necessary for the line of such road or canal, or the site of such bridge, not exceeding sixty feet in width, besides a sufficient quantity thereof for toll houses, work shops, materials for construction, timber excepted, a right of way over adjacent lands to enable such corporation to construct and repair its road, canal or bridge, and to make proper drains; and in the case of railroad, to appropriate sufficient quantity of such lands, in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct; but no such appropriation of private property shall be made, until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner hereinafter provided.

SEC. 23. Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation for the purpose of avoiding annoyances to public travel or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change, shall have the same right to enter upon, examine, survey and appropriate the necessary lands and materials, as in the original location and construction of such road or canal.

SEC. 24. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road.

SEC. 25. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof, shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested such corporation may make such appropriation without reference thereto.

SEC. 26. Whenever such public highway or grounds is taken by a private corporation by agreement with the local authorities mentioned in section 24, such corporation may place such gates thereon, and charge and receive such tolls thereat, as such local authorities may consent to by such agreement, and none other; but when the same is appropriated without such agreement, as provided in section 25, such corporation shall not place any gate or other obstruction upon the public highway or grounds appropriated, nor charge or receive any toll from any person passing over or along the same.

SEC. 27. Any road, other than a railroad, constructed by a corporation formed under this act, shall be cleared of standing timber for thirty feet in width of said road, and shall have a track in the center not less than sixteen feet wide, finished and kept in good travelling condition, except when the cutting on said road, is six feet or more deep on either side, in which case such track need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of such narrow track.

SEC. 28. All streams or other waters upon the line of such roads, shall be safely and securely bridged, except where the county court of the county wherein the line of such road may cross such streams, or other water; or if such stream or other water form the boundary between two counties, then the county court of either of said counties may authorize the corporation to place a ferry-boat upon such stream or other water, to be kept and run for such toll as the county court may prescribe, and in the manner required of ferries established under the general statutes in relation to ferries; or except where such county court may authorize such corporation to connect their road with a ferry, now or hereafter established over such stream or other water under the general statute in relation to ferries.

SEC. 29. Whenever a road of any kind herein mentioned, other than a railroad, is completed, or any particular section of it fit for public travel, the corporation shall give notice thereof, by publication in some newspaper of general circulation, along the lines of such road or section, or by posting notices along the line of such road or section, or by posting notices along such line in some conspicuous places, not less than five miles apart, and thereafter such road or section thereof is a common highway, so that every person with his stock and vehicles of every description may travel thereon upon the payment of the tolls prescribed by the corporation; subject to the power of the corporation by giving notice thereof in like manner to suspend such right of travel upon all or any portion of such road, for a reasonable time to enable it to make any necessary repairs or improvements thereon.

SEC. 30. A corporation shall only collect and receive toll on its road at a gate established thereon, and such shall be plainly and specifically printed or written upon a signboard, posted at such gate, in plain view of the travel on the road; but such corporation shall not establish any gate within the limits of any town, whether incorporated or not, or within one-half mile of the limits of such town, except as specially provided in section 26; but no person traveling on foot, or going in any manner, or with any property, from one part of his farm to another part, or going to or from church, funerals or elections, is liable to pay for traveling upon such roads.

SEC. 31. Any person traveling upon any road herein mentioned, who shall pass through a gate thereon, without paying the toll legally chargeable thereat, or who shall go round such gate, with intent to avoid the payment of such toll, shall be liable to the corporation for three times the amount thereof, and any corporation which, by its agents or servants, or in any manner shall illegally collect any toll from any person traveling on such road, shall be liable to such person for three times the amount thereof.

SEC. 32. Any bridge constructed by a corporation formed under this act, when completed and fit for public travel, and notice thereof is posted in some conspicuous place on such bridge, or by publication in a newspaper, as in the case of a road, is a common highway, within the meaning, and subject to the conditions specified in section 29, as to roads, and subject to the further power of the corporation to prescribe by advertisement in some conspicuous place on such bridge, the rate of speed any one may travel on such bridge.

SEC. 33. A corporation may collect and receive such tolls for crossing its bridge, as may be plainly written, or printed upon a sign board, posted in some conspicuous place on such bridge, but no person not liable to pay toll on a road as provided in section 30, is liable to pay toll for crossing such bridge; and any person who shall pass over such bridge without paying the toll legally chargeable thereat, or any corporation which shall illegally collect any toll from any person crossing such bridge, shall be respectively liable to each other for three times the amount of such toll, as provided in section 31, in case of roads.

SEC. 34. Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe.

SEC. 35. It shall be the duty of every incorporation organized for the construction of any macadamized road, plank road, clay road or bridge, to keep an accurate statement or account of the moneys expended by said corporation, in the construction of any such road or bridge, and keeping the same in repair, including any sums paid for lands, appropriated as necessary for said corporation, which statement or account shall be verified at the time of the annual meeting held for the election of directors, by the president of the said corporation, or one of the directors thereof to the effect that he believes the said account to be just and correct, and a copy of such verified account shall within ten days after such annual election be deposited with the clerk of the county with whom the articles of incorporation are filed. Said corporation shall also keep an accurate account of the tolls received for traveling upon said road or bridge, or of other profits accruing to said corporation, which account shall be verified in like manner, and a copy thereof deposited with said county clerk within ten days after such annual election.

SEC. 36. At any time after the expiration of ten years from the time of taking tolls on any macadamized road, plank road, clay road or bridge, it shall be lawful for the county court of any county through which any such road or part thereof shall pass, or in which such bridge may be situated, to pay to such corporation the amount of money expended by it in the construction of such road or bridge, and keeping the same in repair, and all other necessary expenses, including any sums paid for lands appropriated by such corporation, together with interest on said account, and sums of money, at the rate of twenty per centum per annum, after deducting from said amount the tolls and other profits annually received by said corporation, and after the payment of the amounts expended in constructing and keeping in repair said road or bridge, and other necessary expenses incurred in and about the same, and interest thereon less the amount received by such corporation, the said road or bridge shall become free for public travel.

SEC. 37. The foregoing section shall not be construed so as to prohibit said county court at any time before the expiration of said period of ten years, from purchasing said road or bridge, for any sum that may be agreed upon by the said county court and corporation.

TITLE II.

Mode of proceeding to appropriate lands.

SEC. 35. Corporation may maintain action for the appropriation of land.
36. To be commenced and proceeded as in ordinary cases.
37. Against whom commenced.
38. Complaint to describe land. Summons how served.
39. Substitution of landlord when action brought against tenant.
40. Answer what it may contain.
41. When view ordered.
42. Judgment appropriating land and effect thereof.
43. Appeal from judgment and effect of.
44. Costs and disbursements.
45 New trial.
46. Damages, disposition of.
47. Appropriations of private property to public uses, proceeding therein, as in this title.

SEC. 38. Whenever any corporations authorized as in the provisions of this act, to appropriate lands or right of way, is unable to agree with the owner thereof as to the compensation to be paid therefor, or if such owner be absent from this state, such corporation may maintain an action in the circuit court of the proper county against such owner for the purpose of having such lands appropriated to its use, and for determining the compensation to be paid to such owner therfor.

SEC. 39. Such action shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided.

SEC. 40. The action shall be commenced against the person in the actual possession of the land at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof; or if there be no one in the actual possession, or acting as owner thereof, then against an owner unknown.

SEC. 41. The complaint shall describe the land sought to be appropriated, with convenient certainty. If the defendant, or either of several defendants, is a non-resident of this state, or unknown, service of the summons may be made by publication as in ordinary cases.

SEC. 42. A defendant in actual possession may, for answer, plead that he is in possession only as the tenant of another, naming him and his place of residence, if known, and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and and thereafter the action shall proceed in all cases as if originally commenced against him.

SEC. 43. The defendant in his answer may set forth any legal defense to the appropriation of such lands, or any portion thereof; or omitting such defense, and aver the true value of the land in question, or the damage resulting from the appropriation thereof, or both.

SEC. 44. Upon the motion of either party, before the formation of the jury, the court, upon the request of either party, shall order a view of the lands in question, and upon the return of the jury, the evidence of the parties may be heard, and the verdict of the jury given.

SEC. 45. Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands in question to the corporation, and thereafter such lands are the property of such corporation.

SEC. 46. Either party to this action may appeal from a judgment therein, in like manner and with like effect as in ordinary cases; but such appeal shall not stay the proceedings, so as to prevent such corporation from taking such lands into possession and using them for the purposes of the corporation.

SEC. 47. The costs and disbursements of the defendant shall be taxed by the clerk, and recovered off the corporation; but if it appear that such corporation tendered the defendant, before commencing the action, an amount equal to, or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements off the defendant.

SEC. 48. If any judgment in such action be reversed, and a new trial had, and at such second trial, the jury assess the damages of the defendant at a greater sum than before, the court shall in addition to the judgment appropriating the land as provided in section 42, give judgment in favor of the defendant for such excess.

SEC. 49. If the defendant accept the damages paid to the clerk, he receives his right of appeal, and if he do not, such sum shall remain in the control of the court, to abide the event of the appeal, and if the defendant or unknown owner of the land do not appear and claim the same, it shall be invested for the benefit of whom it may concern, as in case of unclaimed moneys in the sale and partition of lands.

SEC. 50. Whenever the law authorizes private real property to be appropriated to public uses, the same may be entered upon, examined, surveyed, and selected, in the mode prescribed by the statute giving such authority, and thereafter the state, county, or other municipal or public corporation therein, seeking and authorized to make such appropriation, may proceed in the mode in this title prescribed to have such property appropriated, and the compensation therefor determined and paid, and not otherwise; except that the compensation in the case of such state, county, or municipal or public corporation, is paid by the deposit in court of an order duly drawn upon the treasurer thereof, for the amount of such compensation.

SEC. 51. Owing to the necessity of certain corporations being formed under this act immediately, so as to commence operations before the winter rains set in, this act shall take effect and be in force from and after its approval by the governor.

Passed the House of Representatives October 13, 1862.

JOEL PALMER,
Speaker House Representatives.

WILSON BOWLBY,
President of the Senate.

APPROVED October 14, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to organize the militia.

SECTION 1. *Be it enacted by the Legislative Assembly of the State of Oregon,* That it shall be the duty of the assessor of each county in this state, annually, at the time prescribed by law for assessing property, to make out a list of all persons in their respective counties, who are liable to do military duty under the laws of the United States, and of this state, which list shall be alphabetically arranged, and shall designate the precinct in which each person named in such list resides, which shall be filed by such assessor in the office of the county clerk of their respective counties, at the same time and in the same manner as is provided by law for the assessment roll, and the clerk shall keep the same open for inspection as is provided by law for the assessment roll, and also record the same in his office in a book to be kept by him for that purpose.

SEC. 2. That the said military assessment list shall be corrected in the same manner and at the same time as is provided by law for the assessment roll, and it shall be the duty of the county clerk of each county to deliver to the adjutant general of the state a duplicate of said list certified by him, within twenty days after the list has been so corrected, and the compensation for making out said military list shall be the same, or be determined and fixed in the same manner, as for making out the assessment roll.

SEC. 3. That it shall be the duty of the county court to assess upon each and every person liable to do military duty a tax of two dollars, which tax shall be collected annually at such time and in such manner as is provided by law for the collection of taxes; all sums so collected shall be paid over to the state treasurer, who shall place them in a separate fund to be called the military fund.

SEC. 4. If any assessor shall neglect or refuse to perform any of the duties required of him by this act, he shall be subject to the same penalties, liabilities and punishments as is provided by law for a neglect or refusal to perform any of the duties required of him for the assessment of civil taxes; and moreover he shall forfeit and pay the sum of not less than three hundred, and not more than one thousand, dollars, to be sued for in the name of the state, by the district attorney of the respective county, and recovered in the name of the state, and paid into the military fund of the state; and if the county clerk shall neglect or refuse to make and deliver to the adjutant general the duplicate of the military assessment list, as directed by this act, he shall forfeit and pay the sum of not less than two hundred, and not more than five hundred, dollars, to be sued for and recovered in the same manner as is provided in this section with respect to assessor, and paid into the military fund of the state.

SEC. 5. That the following persons shall be exempt from military duty in this state: persons exempt by the law of the United States, and ministers of the gospel, judges of the supreme court, county judges, county clerks, sheriffs, members of the legislative assembly, secretary of state, state treasurer, all clerks in telegraph offices, while so employed, and no other persons.

SEC. 6. That the militia of this state shall comprise one division, which shall be divided into three brigades, and each brigade shall be divided into three regiments.

SEC. 7. That the counties of Jackson, Josephine, Douglas Umpqua, Coos and Curry, shall constitute the first brigade; that the counties of Lane, Linn, Benton, Polk, Marion, Yamhill, Clackamas, Washington, Columbia, Clatsop, Tillamook and Multnomah, shall constitute the second brigade; and the counties of Wasco, Baker and Umatilla, shall constitute the third brigade.

SEC. 8. That the governor shall appoint one major general to command the division, and one brigadier general for each brigade, who shall hold their offices for four years, and until their successors are appointed and qualified.

SEC. 9. That officers of the general staff, and all other officers of the staff of the commander-in-chief, shall be appointed by the governor, and shall continue in office for the same term as the governor, or at his pleasure.

SEC. 10. That the military staff of the commander-in-chief shall consist of one adjutant general, one judge advocate, one surgeon general, each with the rank of colonel, and four aids-de-camp, with the rank of lieutenant colonel.

SEC. 11. That the staff of the major general shall consist of one assistant adjutant general, with the rank of lieutenat colonel, three aids-de-camp, with the rank of major, and one surgeon, with the rank of lieutenant colonel. The staff of each brigadier general shall consist of one assistant adjutant general, with the rank of major, two aids-de-camp, with the rank of captain, and one surgeon, with the rank of major. The staff of a colonel of a regiment, and of a lieutenant colonel, or a major commanding a battalion, as hereinafter provided, shall consist of one adjutant, and one assistant surgeon, each with the rank of first lieutenant, and one sergeant major, to be appointed by such commanding officer, the adjutant being selected from the line, as in the United States army. The governor may appoint on the recommendation of the adjutant general, one assistant adjutant general, with the rank of lieutenant colonel, and four assistant adjutant generals, with the rank of major, who shall be temporarily attached to his staff, but under the direction and control of the adjutant general. All assistant adjutants general are ex-officio inspectors general.

SEC. 12. That whenever the militia of the state is called into active service, the governor shall appoint one quartermaster general, one commissary general and one paymaster general, each with the rank of colonel, and such assistants as the exigencies of the service may require, to enable them to discharge the duties of their several offices.

SEC. 13. The adjutant general shall be ex-officio chief of staff, inspector general, and chief of ordnance, and in time of peace, quartermaster general and commissary general. He shall receive a salary of eight hundred dollars annually to be paid out of any moneys in the treasury not otherwise appropriated.

SEC. 14. It shall be the duty of the adjutant general to take charge of, and to carefully guard and preserve and to account for all arms, accoutrements, ammunition, ordnance stores, and other military property belonging to this state or granted to it by the congress of the United States. He shall keep and file in his office, all returns, reports, and military correspondence made by him, in accordance with the provisions of this act. He shall also keep an account of all moneys received and expended by him. The manner of keeping these accounts and papers where not otherwise provided by law, shall be directed by the commander-in-chief, and they shall always be subject to his inspection. He shall on or before the second Monday in September of each year make to the governor a report of all the transactions of his department, since his last annual report, containing:

1. An account of all moneys received and expended;
2. An account of all arms, accoutrements, ammunition, ordnance stores, and military property of every description belonging to the state, from what source received, to whom issued, or how expended, and by whose order;
3. A statement of the present condition of all such property under his charge, and if any such property shall not be under his charge, he shall state in whose possession the same may be;
4. The number, strength and condition of the organized militia, and the strength of the enrolled militia of the state.

He shall also make and transmit an annual return of the militia of this state, pursuant to the requirements of the act of congress, of

March 2d, eighteen hundred and three, to the president of the United States, a copy of which, duly certified, he shall lay before the commander-in-chief of this state. He shall also perform all other duties appertaining to his office, or which may be enjoined on him by law. He shall be the medium of military correspondence with the commander-in-chief.

SEC. 15. Before entering upon the duties of his office, he shall give bonds to the state of Oregon, with good and sufficient sureties, to be approved by the Governor, in the sum of ten thousand dollars, conditioned that he shall faithfully perform all the duties enjoined on him by law. If at any time the governor shall deem the sureties so given to be insufficient he shall require the adjutant general to give new sureties to be approved by him, and if the adjutant general shall refuse or neglect to do so the governor shall thereupon remove him from office.

SEC. 16. That the brigadier general shall cause his brigade to be divided into three regimental districts, containing as near as may be the same number of persons liable to military duty, and the colonel of each regiment shall cause his regimental district to be divided into ten company districts, each containing as near as may be the same number of persons liable to military duty.

SEC. 17. That the election for officers of the enrolled militia shall be held on the second Tuesday of May, bienially, which officers shall enter upon the discharge of the duties of their respective offices upon the first day of July succeeding such election: *Provided,* That as soon as practicable after the return by the assessor of the enrolled militia required by this act, the commander-in-chief shall order an election of officers who shall hold their offices until the first day of July, 1864, which election shall be held in the manner prescribed in this act, for the organized militia.

SEC. 18. That for the purpose of carrying out the provisions of this act, the governor is hereby authorized to appoint the colonel, lieutenant colonel and major for each regiment, authorized hereby, who shall hold their offices until an election can be held.

SEC. 19. Whenever a sufficient number of persons, by the provisions of this act, residents of any county of this state, subject to military duty, shall subscribe to a call for the organization of a volunteer company, the brigadier general, commanding the brigade, in which said county is situated, upon due application of the persons who have subscribed as above, shall appoint some suitable person resident of the county, to open a book, in which he shall enter the names of the persons so volunteering, and shall fix a time and place of meeting for the purpose of organization by giving ten days' notice thereof, by publication in some newspaper, or by posting notices in at least three public places in the county, the person so appointed shall preside at such meeting, and organize the same; he shall superintend the election of the officers of said company, which election shall be by ballot, he shall make out after said election shall have been determined, a list of persons so volunteering, a certificate of each officer so elected, and transmit them to the brigadier general, commanding the brigade in which such company shall be organized, who shall, if found correct, transmit the same, with his approval, to the adjutant general of the state, together with a copy of the proceedings of said meeting, and a copy of his appointments, and of the notice of said meeting, duly certified by him, and if it shall be found that such company has been organized and such officers elected in conformity with the provisions of this act, such company shall be listed in the office of the adjutant general as a company of the organized militia of this state, and the officers so elected shall be commissioned by the commander-in-chief.

SEC. 20. The volunteer or independent companies shall be constituted, officered, armed and equipped in the same manner as similar corps in the United States army.

SEC. 21. Volunteer companies and battalions may adopt a constitution and form by-laws, rules and regulations, not inconsistent with the constitution of the United States, or of this state, for the government of their members, and for their improvement in military science, a copy of which shall, at the time of adoption, be sent to the adjutant general. It shall be the duty of the acting orderly sergeant of the company, and sergeant major of the battalion, to keep a perfect and complete record of the constitutions, by-laws, rules and regulations, of his company, or battalion, which shall be signed by the captain, or commander, and countersigned by the orderly sergeant, or sergeant major; and said record shall at all times be subject to the inspection of any member of the company, or battalion, and all military officers or persons interested therein; and if any member of such volunteer company, or battalion shall fail to comply with the provisions of such constitution, by-laws, rules and regulations, he may be expelled from such company, or battalion, and his name erased from its roll.

SEC. 22. When any volunteer company shall be organized according to law, the commanding officer thereof may apply to the commander-in-chief, through the proper military authority, for such arms and accoutrements, or stores, as may be required, such application being first submitted to the county judge, and receiving his approval, which shall be indorsed thereon. If the commander-in-chief shall approve such application, or any part thereof, he shall give an order, upon the back thereof, directing the issue by the adjutant general, who shall immediately notify the officer making such application, and the county judge who approved it, that the arms and accoutrements, or stores, mentioned in such application, or any portion thereof, are ready for issue; and thereupon it shall be the duty of such officer to give such bonds and security as may be deemed requisite by the county judge, to secure the county from loss on account of use or misapplication of such arms, or equipments, or other stores. And on due notification from such county judge, that such bonds have been given, to his satisfaction, and on receiving triplicate receipts from such officer, the adjutant general shall make the issue. He shall file one copy of such receipts in his office, and transmit the other two, one to the secretary of state, and the other to the county clerk of the county to which such volunteer company belongs.

SEC. 23. It shall be the duty of the county court of each county in which there shall be one or more organized volunteer companies, upon application of the captain or commanding officer of the same, to provide for each company in said county, an armory, safe and suitable for the drill of squads in the school of the soldier, and an armorer, to take charge of the same, and said court shall also, at each of its sessions, audit, and allow, and cause to be paid, the necessary expenses of the same: *Provided*, That the total amount for all the purposes above mentioned shall not exceed fifty dollars in money per month, for each company.

SEC. 24. The commander-in-chief shall have authority to demand and receive back from any county, or from any portion of the military force of this state, any arms, equipments, military stores, or other property belonging to the state, which may be in possession of any such counties or military force. And when such arms, equipments, military stores, or other property, shall again come into the possession of the adjutant general, or other officer designated by the governor to receive them from such counties, or military forces, to which they have been issued, as above provided, it shall be the duty of the adjutant general, or officer so appointed, to receipt for the same, which receipt shall be in triplicate, one copy to be filed in the office of the county clerk, one in the office of the adjutant general, and the third in the office of the secretary of state.

SEC. 25. All arms, equipments and military stores, issued as hereinbefore provided, shall at all times be subject to examination by the inspecting officer of the state, and of any other officer designated by the commander-in-chief for that purpose; and if such officer shall find any of such public property out of repair, injured or defective, he shall immediately notify the facts to the county court of the county, and report the same, through the proper channels, to the commander-in-chief, who, if the damage shall not be repaired, and the defects or losses supplied within a reasonable time, shall order the same to be done under the direction of some officer, and the vouchers for the expense thereof shall be duly examined and audited by the state board of military auditors, and paid on the draft of the secretary of state, out of the military fund.

SEC. 26. It shall be the duty of the secretary of state to charge the value of all arms, equipments, and military stores, issued as above provided, to the counties in which such public property shall be issued, and all expenses of repairs, of damage and defects, as provided in the foregoing section, and double the value of any arms, accoutrements and military property which such counties or such military companies shall have failed to return to the state on the demand of the governor. At the the close of each fiscal year, he shall settle the account of each county with reference to such issues and military charges, and the amount so found due shall, on the requisition of the secretary of state, be assessed at the time of the next annual assessment, as a part of the county taxes, and be collected in such county in the same manner as the ordinary taxes, and shall be paid into the state treasury as a part of the military fund of the state.

SEC. 27. The transportation of all arms, equipments and military stores, issued to troops or received by the state, under the provisions of this act, shall be contracted for, under the direction of the commander-in-chief, by the adjutant general and the vouchers for such transportation, when audited by the state board of military auditors, shall be paid from the military fund, on the warrant of the secretary of state.

SEC. 28. No public arms, equipments, or military stores of any kind, shall hereafter be issued to any person not a member of the organized volunteer militia, or of the enrolled militia, called into active service, except in time of war, insurrection or public danger, so imminent that the commander-in-chief shall consider that the public safety requires him to make such issue, in which case an accurate account shall be taken of such issues, and to whom they are made.

SEC. 29. Within ninety days from the passage of this act, each and every officer of volunteer companies now organized, having in his possession any arms, equipments, or military stores belonging to the state, shall give to the county in which he resides, good and sufficient bonds, to be approved by the county judge, to secure the county from loss, on account of the use or misapplication of the same; and the officer so giving bonds to the county, shall, together with his sureties, be released from his and their liabilities for the same property on any bond heretofore given by him and them to the state, and the same shall be charged to the said county; and after the expiration of the said ninety days, no person shall retain, or have in his possession at any time, any arms, equipments, or military stores of any kind belonging to the state, unless they have been properly issued to such person in pursuance of law, and he shall be permitted, by proper authority, to retain the same in the discharge of a public duty; and no person shall use any public arms, equipments, or military stores, belonging to the state, for his private use under penalty in either of the above cases, of not less than five nor over fifty dollars for each offence, to be recovered, in case of a member of the organized militia, or the enrolled militia, in active service, by sentence of a court-martial, or in case of any other person, by suit, in the name of the state, by the district attorney of the county, before any court of competent jurisdiction, and the money so recovered shall be paid into the treasury as a part of the military fund of the state. The commanding general of brigade shall have authority to take possession of such arms and equipments so used, without process of law, and he shall account to the adjutant general for the same.

SEC. 30. Any number of organized volunteer companies, not less than three, nor more than eight, may form themselves into a volunteer battalion, by giving notice of such intention, through their commanding officer to the general of their brigade, who will appoint some suitable officer to hold an election of the officers of such battalion; and the officer so appointed shall fix a time and place for such election by giving ten days' notice thereof, by publication in some newspaper, or by posting notices in at least three public places in the county. Such election shall be by ballot, by the members of the volunteer companies calling for the organization of the battalion. The officer so appointed to hold the election shall preside over and superintend such election, and as soon as it shall have been determined, he shall make out certficates of election of the officers so elected, and a certified account of the proceedings of said meeting, with a certified copy of the notice of said meeting, all of which he shall transmit to the brigadier general of the brigade, who shall transmit them, with a certified copy of the appointment of such officer to hold the election, to the adjutant general of the state through the ordinary channels of military correspondence.

Sec. 31. A battalion of eight companies shall be deemed a regiment, and shall elect one colonel, one lieutenant colonel and one major; a battalion of more than four and less than eight companies, shall elect one lieutenant colonel, who shall be the commanding officer, and one major; and a battalion of three or four companies, shall elect one major, who shall be the commanding officer.

Sec. 32. It shall be the duty of each and every commanding officer of any volunteer company in this state, on or before the last Monday of July of each year, to muster his company, and to make out, in triplicate muster rolls, setting forth the names and number of the members of his company, the officers, in the order of their rank, and the privates, in alphabetical order, and stating at the foot of such muster roll a list of all arms, accoutrements, ordnance and ordnance stores, and other property belonging to this state in his possession; one of which muster rolls, duly certified, he shall transmit, through his commanding officer, to the adjutant general of the state; he shall file one in the office of the county clerk of his county, and he shall keep the other as a voucher for himself. If such company shall form a part of any organized battalion or regiment, the commanding officer thereof shall transmit the same with a muster roll of the field and staff officers of his regiment or battalion, to the adjutant general of the state, through the proper channels of military correspondence.

Sec. 33. All commissioned officers of the organized volunteer regiments, battalions and companies, shall take rank according to the date assigned them by their commissions; and when two of the same grade be of the same date, their rank shall be determined by length of service in the militia; and if of equal service, then by lot. Officers of organized volunteer regiments, battalions and companies, shall in all cases be deemed of superior rank to officers of the enrolled militia of the same grade, irrespective of the date of their commissions.

SEC. 34. All commissioned officers of the staff of the commander-in-chief, the major general and brigadier generals, and all the officers of their respective staffs, and all commissioned officers, non-commissioned officers, musicians, artificers and privates of volunteer regiments, battalions and companies whose names are borne upon the muster rolls of their respective regiments, battalions and companies, shall be denominated the organized militia of Oregon, and shall at all times be subject to be called into active service by the commander-in-chief; and when so called into active service, each person shall be called and mustered according to his commission, enrolment and organization. All other militia in this state shall be denominated the enrolled militia of Oregon.

SEC. 35. In case of war, insurrection or rebellion, or of resistance to the execution of the laws of this state, or upon the call or requisition of the president of the United States, or upon the call of any officer of the United States army commanding a division, department or district, in Oregon, or upon the call of any United States marshal in Oregon, or any mayor of a city, or of any sheriff, the commander-in-chief is authorized to call into active service any portion of the organized or enrolled militia of this state. In case of the absence of the commander-in-chief from the capital, or if it be impossible to immediately communicate with him, the civil or military officer making the requisition for troops, may if he deem the danger imminent and not admitting of delay, serve a copy of such requisition, together with a statement of the Governor's absence, or the impossibility of immediately communicating with him, upon the major general, or, in his absence, upon the general of brigade, who is hereby authorized to exercise, with respect to calling out the troops of his division or brigade, the powers conferred in this section upon the governor; but if the call shall be disapproved by the governor, the troops so called into service will be immediately disbanded. Such call for any portion of the organized militia shall be made by an order issued and directed to the commanding officer of the company, battalion, regiment or brigade, which is so called into service, designating in such order the particular troops called, the time and place of rendezvous, and the officer to whom they shall report. If such order be directed to the major general of division, it will be immediately communicated to the brigadier generals, and by them to all the officers of their respective brigades; and any officer receiving such order will rendezvous and report for duty, as herein directed; and any officer commanding an organized volunteer company, or battalion, on receiving such order, will immediately proceed to notify the same to each individual of his command, by personal notice, or by publication in some newspaper, or by the usual posting in public places of the county or counties from which the call is made, and such officer shall attend in person, or by deputing an officer of the organized militia in his place, at the place of rendezvous, and take the names of all volunteers for service under such call; and if the number of volunteers shall be sufficient to form one or more companies, or battalions, according to the provisions of this act, he shall immediately call and superintend the election of the officers of such companies, or battalions, which elections shall be conducted in the manner prescribed in this act for the election of officers of volunteer companies and battalions, except as to the publication of notice of such election; a proclamation of the call of such election, made by the officer calling it at the place of rendezvous, being deemed a sufficient notice. But the commander-in-chief shall have authority, if he shall deem it expedient, to direct that a portion of the volunteers so presenting themselves shall be assigned to organized volunteer companies or battalions, already in active service, whose numbers are less than the full complement prescribed in this act, after which, those volunteering shall organize and elect as herein described.

SEC. 36. If the number of volunteers so presenting themselves at the place of rendezvous shall not be sufficient to satisfy the call of the commander-in-chief, the brigadier general of the brigade in which such call is made shall promptly proceed to draft from the enrolled militia of his brigade a sufficient number of men to satisfy said call, and this draft shall be made by putting the names of all the enrolled militia of the county, or counties, from which the order directs the forces to be raised, into a box, and drawing therefrom a sufficient number of names to satisfy the call. The persons whose names are so drawn will be summoned by some officer, or officers appointed for that purpose by the brigadier general, in the manner prescribed by law for the summoning of witnesses in civil cases, the time and place of rendezvous, as ordered by the brigadier general, being stated in the summons. In case of the absence or inability of the brigadier general the officer next in rank of the brigade, or in default of any officer of that brigade for duty, the major general, or, in his default, the commander-in-chief shall designate some officer to perform the duties prescribed to such brigadier general with respect to making such drafts; and as soon as a sufficient number of such drafted men shall have appeared at the rendezvous to form a company, or companies, they shall proceed to the election of their company officers, in the manner prescribed in this act.

SEC. 37. Any company, or companies, of the enrolled militia so drafted and organized may, by direction of the commander-in-chief, be enrolled and mustered into any battalion of the organized militia having less than eight companies; and any drafted men of the enrolled militia, not organized into companies, may, at the discretion of the commander-in-chief, be enrolled and mustered into any existing company of organized or enrolled militia, not having the full number authorized by law, and which has already been called into active service. If the enrolled militia, when drafted into service, shall fail to elect any officer designated in such call for an election, in the manner and at the time appointed, as provided in this act, such vacancy or vaconcies shall be filled by appointments made by the commander-in-chief.

SEC. 38. Any officer, non-commissioned officer, musician, artificer, or private of the organized militia of this state, who shall neglect or refuse to rendezvous and organize, when ordered out by the commander-in-chief, shall be deemed guilty of disobedience of orders, and shall be tried and punished by a court-martial; and any person of the enrolled militia who shall refuse or neglect to rendezvous and organize, when drafted as provided in this act, shall be subject to a fine of not less than fifty nor more than five hundred dollars, to be recovered by an action to be brought by the district attorney in the name of the state, upon the certificate of the officer appointed to make the draft, before any court of competent jurisdiction in the county from which such person was drafted, and the fine so recovered shall be paid into the treasury as belonging to the military fund of the state.

SEC. 39. Any private of the organized militia, and any person of the enrolled militia, called or drafted into service, under the provisions of this act, may furnish as a substitute, any person fit for military duty, who has not been called or drafted into service.

SEC. 40. The commander-in-chief may order a public parade of all the organized militia of the state ten days of each year; such parade to be held within the limits of the brigade to which such troops respectively belong; and such public parades shall be reviewed by the commander-in-chief, or, in his absence, by the major general, or by the officer of the brigade of the highest rank present. Immediately after such troops have been reviewed, they shall be inspected by an inspector general, and such inspecting officer, after a minute inspection of dress and military bearing of the field officers and commissioned staff, and the officers of companies, and arms, accoutrements and dress of each soldier, will report the result of such inspection to his commanding officer.

SEC. 41. The rules of discipline and regulations of the army of the United States shall constitute the rules of discipline and regulations of the organized militia of this state; and the rules and articles of war established by congress for the army of the United States, shall be adopted, so far as they may be applicable for the government of the militia of Oregon in active service.

SEC. 42. Courts-martial appointed shall be organized in like manner, and be subject to the rules and regulations governing courts-martial in the United States army; they shall have the same power to compel the attendance of witnesses, when duly summoned by the judge advocate, to preserve order in and about the court room during their session, and to punish contempt, as the judges of the district courts have, under laws of this state.

SEC. 43. Any commissioned officer of a brigade who shall remove his residence from the limits of his brigade, will be deemed to have resigned his commission, and the major general or any brigadier general, who shall absent himself from the state for more than three months without the permission of the commander-in-chief, shall be deemed to have resigned his office.

SEC. 44. Whenever any of the militia of this state shall be called into active service for the space of more than one week, they shall receive the same pay and allowances as United States troops serving in Oregon. Any general or field officer being called into active service, such call shall be deemed to include all the officers of their respective staff.

SEC. 45. When the commander-in-chief shall order the return to the state of any arms, equipments, military stores, or other military property belonging to the state, such arms and military property shall be immediately delivered to the officers authorized in such order to receive it, he receipting for the same, and describing their condition in such receipts, and if the property mentioned in such order shall not be promptly delivered, as directed, the officer named in such order is hereby authorized to take immediate possession of the same in the name of the state; and any person resisting such officer in the performance of this duty shall be deemed guilty of a misdemeanor, punishable by imprisonment for not more than six months in the county jail, and shall be subject to a fine not exceeding five hundred dollars, to be recovered by an action brought by the district attorney in the name of the state, and be paid into the treasury as a part of the military fund.

SEC. 46. The commander-in-chief, adjutant general, and the secretary of state, shall constitute a state board of military auditors. The commander-in-chief shall be president, and the adjutant general shall be secretary of said board.

SEC. 47. The board of military auditors shall have a seal, an impression of which shall be deposited by the secretary of the board in the office of the secretary of state, and be attached to all accounts audited by said board.

SEC. 48. It shall be the duty of said board of military auditors to audit all reasonable expenses for ammunition incurred by volunteer companies in the service of this state, and all other claims required under the provisions of this act. It shall be the duty of the secretary of state to draw his warrant for the amount thus audited, and the treasurer of state is hereby required to pay the same out of any moneys in the military fund not otherwise appropriated.

SEC. 49. The adjutant general shall, under the direction of the governor, prepare and keep in his charge all blank military commissions, and such other blanks as may be required for the service.

SEC. 50. The commander-in-chief may, from time to time, make and publish rules, regulations and orders for the government of the militia of this state, in accordance with the spirit and provisions of this act.

SEC. 51. Any volunteer company may, on its organization, or thereafter, adopt a distinctive name, but shall be known by a particular letter in the battalion or regiment to which it belongs.

SEC. 52. In the absence of any appropriate commander, the next in rank in the command of troops, where not otherwise provided in this act, shall succeed to his authority.

SEC. 53. Every senior, in appropriate command, shall have authority to control his junior, in accordance with the principles of military subordination, under the laws and usages that govern the United States army.

SEC. 54. Any officer cashiered by sentence of a court-martial shall be precluded thereby from holding any commission in the military service of the state, except the sentence be remitted by the commander-in-chief.

SEC. 55. No non-commissioned officer, artificer, musician or private, expelled from his company, or dismissed from service, for any disgraceful cause, shall be permitted to again enter any volunteer company, except the offense be pardoned by the commander-in-chief.

SEC. 56. No officer, inferior in grade to regimental or battalion commander, shall have power to grant discharges to non-commissioned officers, artificers, musicians or privates in active service; but commanders of companies of the organized militia, when not in active service, may issue certificates of service and discharges. All discharges shall be in writing, and shall set forth fully the cause of the discharge, and shall be signed by the officer granting the same.

SEC. 57. Any officer resigning his commission shall do so in writing and transmit the same through his immediate commanding officer, who will make his endorsements thereon, and the resignation shall go into effect when accepted by the commander-in-chief, and not before. Vacancies of commissioned officers of organized companies and battalions—not in active service—caused by resignation, death, dismissal or removals, or by the expiration of the term fixed by the rules and regulations of such company, or battalion, or by any other cause, shall be filled by election. Such elections of company and field officers shall be presided over by an officer appointed for that purpose by the brigadier general; and such presiding officer shall report the result of such election to the officer appointing him, which report shall be transmitted to the commander-in-chief, who shall issue commissions in accordance therewith: *Provided, however,* That when the same officer shall be re-elected, no new commission shall be issued, but the officer so re-elected shall continue to hold under his original commission.

SEC. 58. The commission of any staff officer whose term of office depends upon the pleasure of the officer by whom he is appointed, shall, when such officer is not on active service, be considered as vacated upon the qualification of his successor, and shall be so noted upon the proper books or rolls kept in the office of the adjutant general of the state.

SEC. 59. The commander-in-chief is authorized, at any time, by issuing his orders to that effect, to disband any portion of the organized volunteer forces, or of the enroled militia mustered into service, which may evince a mutinous, disorderly or disobedient spirit, and to deprive them of arms; a copy of which order shall be transmitted to the clerk of the county court, or courts of the county or counties in which such force was raised; after which it shall be a misdemeanor in any person so disbanded to appear with state arms in his possession, or as any portion of the organized volunteer militia, or of the enroled militia in active service, until again drafted or regularly mustered into service, under the penalty of not less than ten nor more than one hundred dollars, for each offense; and such person shall be proceeded against by the district attorney in the name of the state, before any competent court of the county where such person may happen to be, and all fines so recovered and collected shall be paid into the treasury as a part of the military fund.

SEC. 60. The systems of instruction in tactics prescribed for the different arms and corps in the United States army shall be followed in the military instruction and practice of the militia of this state and the use of any other system is forbidden.

SEC. 61. The commanding officer of every organized company shall, during the months of June and December, of each year, furnish the county clerk of his county with a list of the names of the bona fide members of his company who attend regularly to appropriate duty. He shall, also, at the end of each year's service of any member of his company who has performed duty in accordance with the regulations and by-laws of such company, during the year, issue to such member a certificate to that effect, which certificate shall exempt the holder thereof from the poll tax imposed by this act. And if such commander of a company shall make a false list of the members of his company who have done duty as aforesaid, or a false certificate of service, he shall, on conviction by a court martial, be cashiered from service, and shall moreover be subject to a fine of not less than fifty, nor over five hundred, dollars ; to be sued for and recovered in the name of the state, by the district attorney of the county of his residence, in any court of competent jurisdiction, and be paid into the treasury as a part of the military fund of the state.

Sec. 62. When any person drafted for service shall offer, at, or after, the time of rendezvous, a suitable substitute, of the age of twenty-one years, and such substitute shall consent, in writing, to subject himself to all the duties, fines, forfeitures and punishments, to which his principal would have been subject, had he personally served, he shall be accepted by the officer making such draft. And the same rule shall apply to substitutes offered by members of organized volunteer companies called into active service, the commanding officer of such company being the judge of the suitableness of the substitute offered ; and the person whose substitute shall be so accepted, shall be exempted from draft during the term of service of his substitute.

Sec. 63. No action shall be maintained against any member of a court-martial, or officer, or agent, acting under his authority on account of the imposition of a fine or the execution of a sentence on a person not liable to military duty, if such person shall have been duly summoned, and shall have neglected to appear and show his exemption before the court.

Sec. 64. The adjutant general shall have a seal of office, to be approved by the commander-in-chief, and all copies of records or papers in his office, duly certified and authenticated under the said seal, shall be evidence in all cases in like manner as if the originals were produced.

Sec. 65. On the days of military parade, the militia so called out, and doing military duty, shall be considered to be under military discipline from the rising to the setting of the sun, and no officer, non-commissioned officer, musician, artificer, or private, belonging to the same during the time aforesaid, shall be subject to be arrested on any civil process.

Sec. 66. The commanding officer of any parade, review, or drill, and the officer in charge of any rendezvous may cause the ground selected for that purpose to be marked or designated in such a manner as not to obstruct the passage of travelers on any public highway, and if any person during the occupation of such ground for such military purpose, shall encroach upon such bounds, or enter upon such grounds without the permission of such officer commanding or in charge, he may be put and kept under guard by the order of such commander until the setting of the sun of the same day; and, moreover, shall be subject to arrest and punishment by any court of competent jurisdiction for the breach of the peace.

SEC. 67. If any person shall intercept, molest, or insult by abusive words or behavior, any officer, non-commissioned officer or soldier, while in the performance of his military duty, he shall be immediately put under guard and kept at the discretion of the commanding officer of the forces engaged in the performance of such military duty, until the setting of the sun of the same day on which the offence shall have been committed; and, moreover, shall be subject to arrest and punishment by any court of competent jurisdiction for a breach of the peace.

SEC. 68. Any officer, non-commissioned officer or soldier in military duty, who shall disobey the legal orders of his superior, use any reproachful or abusive language to his superior, or misbehave or demean himself in an unofficer or unsoldierlike manner, shall be immediately arrested if an officer, and if a non-commissioned officer or soldier, shall be disarmed and put under guard, and shall be tried and punished by a court-martial according to law and military usage.

SEC. 69. In case of parades, reviews, inspections, or musters of the troops of any brigade, any companies, not organized into a battalion, for the duties of the day, and the battalion so temporarily organized shall be commanded by the officer senior in rank of the companies composing it. It shall be optional with any such unattached companies to attach themselves for the day to any organized battalion or battalions, or to organize a temporary battalion, but no such temporary battalion shall be organized of less than three companies if there be any organized battalion or battalions present on duty to which they may attach themselves without exceeding the complement fixed by this act. If such unattached companies shall not attach or organize themselves in accordance with the provisions of this section, the officer commanding the brigade for the day shall order such assignment or organization.

SEC. 70. Horses, arms, equipments and uniforms of all officers, non-commissioned officers and privates, and for military purposes in the organized or enrolled militia of this state shall be exempt from execution.

SEC. 71. The keepers of all ferries allowed to collect tolls, either under the authority of the state or county, must pass all persons subject to militia duty, going or returning from muster with their horses and equipage free of toll, and if they delay them unnecessarily, shall be subject to a fine of not less than ten dollars for each offence, to be recovered by any person before a competent tribunal, for the use of the general military fund.

SEC. 72. In case of any conflagration happening in any corporated town or city, the mayor, or chief officer thereof, shall have power to demand from the officer commanding the organized militia of said place, a detachment of men to make patrols and maintain good order as long as the conflagration may exist, and the commanding officer shall furnish such detachment. The commanding officer of the detachment shall receive from the civil officer requiring his service, written instructions as to the duty required of him.

SEC. 73. Whenever any change is made in the organization of the militia by congress, the governor shall immediately carry such change into effect by general order, and may in the same manner establish such subordinate regulations as the change may render necessary.

SEC. 74. The adjutant general shall also furnish all necessary blanks and blank books for officers and commanders of companies. Such books and blanks shall be receipted for by the officers receiving the same, to be held and accounted for by him as public property, and no resignation shall be accepted until such books and all other public property delivered to such officers shall be delivered to his successor, or to the adjutant, or quartermaster general, or, satisfactorily accounted for, and double the value of such books or property may be recovered of any such officer, his executors and administrators, by proceedings instituted by the district attorney, in the name of the state, in any court of competent jurisdiction. All amounts so recovered shall be placed in the general military fund.

SEC. 75. Officers and men of a volunteer corps, who shall serve faithfully for seven years, shall be entitled to a certificate from the adjutant general, that they have faithfully so served for seven years, according to the requirements of law, and shall afterwards be exempt from serving in the militia, unless when called into the service of the United States, or in time of war or insurrection.

SEC. 76. That the military fund created by this act shall be used exclusively for military purposes, and expended under the direction of the board of military auditors:

1. Premiums for the best drilled companies of cavalry, artillery and infantry, who shall be present at the state agricultural fair;
2. In payment of such sums, not to exceed two dollars per day for each man, to each company which shall produce satisfactory evidence to the board of military auditors that they have gone into camp and drilled, for not less than three, nor more than ten, days, in the months of June and September;
3. In such manner as may be deemed conducive to the advance of military science, and in the purchase of arms and accoutrements for the use of the state; the certificate of the brigadier general, or assistant adjutant general, shall be evidence of service rendered according to this act.

SEC. 77. That the state printer print three hundred copies of this act, in pamphlet form, and place them in the hands of the adjutant general for distribution to the organized militia.

SEC. 78. That the uniform of the militia of this state shall be similar to that of a like grade in the United States army; with a distinction mark upon the hat or cap, to be prescribed by the commander-in-chief; this article shall not be construed so as to prohibit any company of the organized militia from having and adopting an additional uniform, of any style they may prescribe.

SEC. 79. All fines legally imposed by a court-martial, lawfully constituted, after the proceedings and findings of said court in the premises have been approved by proper authority, shall be, and the same are made collectable by law, it shall be the duty of the adjutant general to certify a list of fines to the county clerk of the county in which the person who may be fined resides, which list shall be entered by said clerk in a book to be kept by him for that purpose; and an execution issued by him for the collection of the same. All fines so imposed shall have the same lien upon property as if a judgment rendered by a court of record in this state.

SEC. 80. That an act entitled an act to organize the militia, passed

February 2d, 1854; also, an act entitled an act to organize the militia, passed January 26th, 1856, together with any other acts, or parts of acts, in conflict herewith, be, and are hereby repealed.

SEC. 81. Inasmuch as there is no organized militia in this state, this act shall be in force from and after its approval by the governor.

Passed the House of Representatives October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate October 16, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act relating to common schools.

1. COUNTY SCHOOL SUPERINTENDENT.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That there shall be elected by the legal voters of the several counties of this state, at the biennial elections, a county superintendent of common schools, for each county, who shall hold his office for two years, or until a successor has been chosen and has qualified as required by this act.

SEC. 2. The superintendent elect shall qualify within thirty days after the day of election, by taking an oath to support the constitution of the United States, and the state of Oregon, and to faithfully discharge the duties required of him by this act; said oath shall be reduced to writing, subscribed to and placed on file in the county clerk's office of his county.

SEC. 3. The annual salary of the superintendent shall be such as the discretion of the county court may deem the yearly services of the superintendent demand: *Provided,* That such salary shall not be less than fifty, nor more than five hundred, dollars per annum.

SEC. 4. The superintendent shall be liable to a fine of one hundred dollars, and shall forfeit the fifty dollars allowed him by this act, if he does not perform the duties herein required of him, and the county court of his county shall bring suit against him, as in other cases, if he fail to pay said fine into the county school fund within sixty days from the day assessed.

SEC. 5. The duties of the superintendent shall be as follows:

1. He shall lay off his county into convenient school districts, and may also make alterations and changes in the same when petitioned so to do, in the manner hereinafter specified, and he shall keep a record showing the boundaries and numbers of all the districts in his county so established and altered;

2. He shall, when he establishes a new district, immediately notify, in writing, some taxable inhabitant of such district, giving in said notice, the number and boundaries thereof, and when he makes alterations he shall immediately notify, in the manner aforesaid, the directors of all the districts concerned;

3. He may establish new districts, where not already laid off, on the petition of six legal voters of each proposed new district, but shall not make any changes in the districts of his county unless petitioned so to do by a majority of the legal voters of each district concerned in the change;

4. He shall, in the name of his county, collect, or cause to be collected, all moneys due and becoming due in his county from all the sources specified by law, and deposit the same with the treasurer of his county, subject to his order, and he shall, on the first Monday of March of each year, make an apportiontment of the entire school fund then in the county treasury, among the several school districts of his county that have reported to him as required by this act, in proportion to the number of persons in the district over the age of four and under twenty years; as soon as he shall have made such apportionment, he shall draw orders on the treasurer in favor of the districts for their respective shares, [and] immediately transmit the same to the clerks of their districts;

5. He shall keep a book in which he shall open an account with the treasurer of his county, also with the several districts. He shall charge the treasurer with all the school funds going into his hands, and when the treasurer shall present to him the district clerk's receipts he shall credit the treasurer with the amount. When the superintendent shall have made the yearly apportionment of the school fund, he shall credit each district with the amount thus set apart to it, and on

receiving the clerk of a district's receipt from the treasurer, shall charge the amount to such district;

6. He shall, when the selections of school lands have not been made in his county, select as such sections sixteen and thirty-six of each township, or, if any part or all of such sections are claimed through donation, pre-emption or purchase, he shall select in lieu thereof, such other suitable lands as he can find nearest thereto, and when he shall have made such selections he shall immediately notify the proper land officer of the state that such lands have been selected for school purposes;

7. He shall take good care of the school lands of his county, and if any person shall in any manner trespass upon the same, he shall prosecute them for double the amount of damage done said land, such sum to be paid into the county treasury and shall belong to the school fund of the county.

8. He shall strictly examine all persons who apply to him for certificates with the intention of teaching in his county in the following branches, viz: Orthography, reading, writing, arithmetic, English grammar, geography, modern history and mental algebra, and if they possess a good moral character and are loyal to the United States government, he shall give them a certificate of the following form, to-wit:

No ....
Granted to M——
Orthography ....
Reading ....
Writing ....
Arithmetic ....
English Grammar.
Geography ....
Modern History...
Mental Algebra ...
Teaching ....
Date ....186..

No...... Good for ...... years, or ...... Quarter.

TEACHER'S CERTIFICATE.

I hereby certify that .... is of good moral character, and that ...... has passed an examination in the following branches, with the following result:

Orthography..................	——	Mental Arithmetic............	——
Reading....................	——	Written Arithmetic...........	——
Writing.....................	——	Mental Algebra	——
Arithmetic..................	——	Modern History...............	——
English Grammar............	——	Teaching	——

.... County, Oregon,
.... 186..

....
County School Superintendent.

And if the applicant pass an examination so satisfactory to the superintendent as to justify him to set the figure one opposite all the branches named in the foregoing certificate, the certificate shall be good during the term of office of the superintendent issuing the same;

but if the superintendent rate the applicant number two, or three, the applicant shall obtain a certificate for every quarter's school they teach under district organization, and such superintendent may, whenever he may deem it advisable, set apart a certain day, or days, in any quarter, for the examination of applicants for teachers' certificates, giving due notice thereof; and an applicant failing to be examined, at such time, shall pay to the superintendent a fee of two dollars and fifty cents for such certificate;

9. He shall visit the schools taught under his certificates once in six months, and give such information, and make such suggestions as he may deem essential to the welfare and progress of the school.

10. He shall receive the reports from all the districts of his county, and shall, by the first Monday of April, of each year, make out, in his record kept for the purpose, from the district reports, a general report, adding such suggestions thereto as he may deem of importance to the cause of education, and transmit a copy thereof to the superintendent of public instruction.

11. He shall, by the first Monday of September of each year, make out a finance report to the county court, showing the amount of moneys assessed and collected at county expense, and applied to common schools, during the year ending the first Monday of April, previous;

12. He shall turn over to his successor in office, when he shall have qualified as required by this act, all books and papers belonging to the office.

Sec. 6. In case of a vacancy in the office of county superintendent, the county court shall appoint some suitable person to fill out the unexpired time.

Sec. 7. The county court of the several counties of this state, are hereby required to levy, at the same time they levy other taxes, a tax upon all the taxable property in their county, for school purposes, of two mills on the dollar, which shall be collected at the same time, in the same manner and by the same officer, that other taxes are collected, and such tax shall submit to its proportion of the loss through delinquency.

Sec. 8. The county treasurer of each county shall make an annual exhibit of all school funds coming into and paid out of the treasury. He shall also retain and produce all the superintendent's orders by him paid off, on the yearly settlement with the county superintendent.

SEC. 9. The superintendent shall require every person applying to him for certificates to teach, in his county, to take an oath to support the constitution and laws of the United States, and the state of Oregon, and that they will, without any mental reservation or evasion whatever, bear true allegiance and fidelity to the same against all enemies, foreign or domestic, before he shall give them such certificate.

SCHOOL DISTRICTS.

SEC. 1. The taxable inhabitants of a newly established district receiving the notice from the county superintendent, as provided in section five under the title of county school superintendent, shall immediately write and post up three notices in public places in the district, notifying the citizens thereof to assemble at some convenient place for the purpose of organizing and electing three directors and a clerk, to serve the remainder of the school year, or until their successors are chosen and have qualified; when six or more voters have assembled pursuant to notice, they shall constitute a quorum to do business, and shall have power to do all business done at annual school meetings.

SEC. 2. Such meeting shall organize by appointing a chairman and secretary, and may then proceed to elect, by ballot, three directors, who shall hold their office until their successors are elected and qualified. Such meeting shall also elect a district clerk, who shall hold his office until the first annual meeting thereafter, or until his successor has been chosen and qualified.

SEC. 3. The directors and clerk elected at the first meeting shall qualify immediately by taking an oath to support the constitution and laws of the United States and the state of Oregon, and to faithfully discharge the duties of their office to the best of their ability, and the clerk shall give a bond to the directors for such sum as they may require as an additional pledge for the faithful performance of his duties; the chairman of meetings or any one he may choose shall administer the oath of office to the directors and clerk elect.

SEC. 4. The directors and clerk elected and qualified as aforesaid, shall have the same power and shall perform the same duties hereinafter required to be performed by directors and clerks elected at the annual meeting of regularly organized districts.

SEC. 5. Organized districts shall hold annual meetings on the first Monday of April, and shall elect one director every year, for each district, who shall qualify as aforesaid, and shall hold his office for three years, so that the oldest director shall retire from office in order. The directors elected on the organization of a district shall remain or retire as a vote of the first annual meeting may decide, the two getting the highest votes to retain their office until the next annual meeting, and the one getting the highest vote thereat, shall serve until the next annual meeting thereafter.

SEC. 6. Any two directors shall constitute a quorum to do business.

SEC. 7. The oldest in office of the directors shall act as chairman of all meetings.

SEC. 8. The duties of directors of school districts shall be:

1. To authorize the clerks to call special meetings;

2. To issue warrants to the clerks, authorizing them to collect, in the name of the district, all taxes assessed to the inhabitants thereof;

3. When authorized by a majority vote of the district, to purchase, lease, or build school houses, and to buy or lease lands for school purposes, and to take care of and furnish their school houses with the necessary fuel, lights, libraries, apparatus, &c.;

4. To see that the wishes of the district toward outside scholars are respected;

5. To employ teachers and assist them in the government of the school. They shall not employ any person to teach in their district who shall not first produce a certificate from the superintendent, of the style required by this act;

6. To audit all claims against the district and draw orders on the clerk for the amount;

7. To visit, by board, all district schools taught in their districts once each month, and to make such suggestions to the teachers and schools as they may deem for the progress and advancement of the same;

8. To secure, as near as possible, a uniform series of school books for their districts;

9. To require of the district clerk, a bond of such force, as shall seem just and reasonable for the faithful performance of his duties;

SEC. 9. The directors shall perform such other duties, not provided for in this act, as the wants of their district may, from time to time, demand; and if they neglect to perform all the duties enjoined upon them by this act, they shall forfeit their office, and pay a fine of ten dollars into the treasury of the district, subject to the decision of a majority vote of their district.

Sec. 10. All districts organized in pursuance of this act, shall be to all intents and purposes a body corporate, competent to transact all business coming under their jurisdiction, and to sue and be sued. When suit is commenced against any district, notice must be served upon two of the directors.

Sec. 11. District meetings, legally called, shall have power to levy a tax upon the district, and make any necessary appropriations for the support and benefit of schools, also adjourn from time to time: *Provided*, A majority of the legal voters present so decide.

Sec. 12. Districts shall not be entitled to their proportion of the school fund at the disposal of the county school superintendent, unless they shall report to him by the first Monday of March, of each year, and shall have had a school taught in their district of three months' duration, in each year. When thus forfeited, no recourse whatever shall be had to obtain the same.

Sec. 13. No person shall be a voter at school meetings who is under twenty-one years of age, was not a resident of the district one month preceding such meeting, and unless he has paid other tax than road tax in the county in which the district is located; women who are widows, and have children and taxable property in the district, may vote, by written proxy or in person, at such meetings, if they choose.

Sec. 14. Districts cannot levy a tax for any purpose, unless the notice calling the meeting states this to be the object.

Sec. 15. Schools supported by a tax upon the district shall be free to all persons between the ages of four and twenty years, residing therein; and persons from outside may be admitted on such terms as the district may direct.

Sec. 16. The minutes of all school meetings must be signed by the chairman and secretary.

Sec. 17. If any district shall employ a teacher who has not obtained a certificate as required by this act, and laid the same before the directors for their inspection before commencing school, such district shall forfeit its proportion of the county school fund for the year.

Sec. 18. When a vote is being taken in district meetings on levying a tax, the ayes and noes shall be called if demanded by two or more voters of the meeting.

CLERKS.

SECTION 1. Each school district shall elect at the annual meetings a district clerk, who shall hold his office for one year or until his successor is chosen and qualified as required in section third of this act relating to school districts.

SEC. 2. It shall be the duty of district clerks:

1. To record all proceedings of his district in a book to be by him provided for the purpose.

2. To give notice, as required in this act, of annual and special meetings.

3. When he receives the audited assessment roll and warrant from the directors, to collect all the taxes for which the roll calls by the time and in the manner authorized by the warrant.

4. To make in his record a yearly report for his district, and send a copy thereof to the county school superintendent, such report to embrace the following, and shall, as near as may be, be submitted in the following form, to-wit:

YEARLY REPORT OF SCHOOL DISTRICT NO. ——.

No. legal voters........................		No. scholars in average attendance........	
No. persons over 4 and under 20 years age.		Am't paid teachers from district tax......	
No. male scholars........................		Am't rec'd and paid teachers out of co. funds	
No. female scholars......................		Am't incidental expenses................	
No. quarters school taught...............		Total am't tax levied and collected........	
Kinds books used were, &c................		Names teachers employed were............	
................................., 1862.		A B, District Clerk.	

5. To keep a correct account in a book provided for the purpose, of all moneys coming into his hands, and of all paid out, belonging to his district; and shall make a report of the same to the annual meetings, and when called upon by the directors to do so, shall report at special meetings.

6. When he receives the superintendent's order for the money set apart for his district, out of the county school fund, he shall immediately call upon the treasurer, either in person or otherwise, present his order, get the money and receipt for the same;

7. To act as attorney for the district in all suits for or against;

8. He shall turn over all district money, books and papers to a duly qualified successor.

SEC. 3. The clerk shall have for his services five per cent. of the money collected by him of district taxes.

SEC. 4. The clerk shall, if he fails to perform all the duties required of him by this act, forfeit the per centage allowed him, and suffer the enforcement of his bond.

[SEC.] 5. The clerk shall act as secretary of all meetings.

TEACHERS.

SECTION. 1. Teachers, before making application to teach in any district organized and perpetuated under this act, shall procure from the county superintendent of common schools, a certificate of qualification and character, and they shall produce the same to the directors on making application. If any person shall violate this section, they shall be liable to a fine of twenty-five dollars, to be recovered by law for every such offense, payable to county school fund.

SEC. 2. A teacher's duty, while in charge of a school, shall be as follows:

1. To maintain order in school, and conduct himself in such a manner before his school as to command respect from his pupils;

2. To commence school at half-past eight o'clock, A.M., and close at four o'clock, P.M., of each day giving one hour for recreation at noon, unless otherwise ordered by the directors;

3. To labor incessantly, during school hours, to advance the scholars in their studies to create in their minds a desire for knowledge, principle and morality, politeness, cleanliness and the preservation of physical health;

4. To keep a register showing the names, age, sex and daily attendance of all persons attending his school, and hand the district clerk a copy of the same at the close of each quarter;

5. To give a public examination on the last day of each quarter's school, and invite the county superintendent to be present.

SEC. 3. Teachers may, in case the county superintendent does them injustice on examinations, apply to the superintendent of public instruction, who is hereby authorized to issue certificates to teachers of the same force, and granting them the same rights and privileges as those issued by the county superintendent.

SEC. 4. Sixty-five days, or twelve school weeks, shall constitute a quarter of a school year.

SEC. 5. The following acts, parts of acts and sections of acts are hereby repealed, viz:

1. Section second of an act entitled an act relating to territorial and school taxes, passed Jan. 30th, 1855;

2. All of chapter first of an act entitled an act relating to common schools and school lands; all of chapter second of said act relating to election of county superintendent, and all of chapter third of said act relating to school meetings, clerks and teachers;

3. All of an act entitled an act to amend an act entitled an act in relation to common schools and school lands, passed Jan. 31st, 1855;

4. All of chapter third entitled "miscellaneous provisions," passed January 12th, 1854;

5. All of "an act supplemental to the act relating to common schools and school lands," passed Jan. 22d, 1855;

6. All of "an act to amend an act relating to common schools, passed Jan. 31st, 1855, approved Oct. 19th, 1860.

SEC. 6. The state printer is hereby required to print and prepare in pamphlet form, within four months from the date hereof, five hundred copies of this act, and distribute the same among the county school superintendent of the several counties of this state.

Passed the House of Representatives October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate October 16, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to authorize the construction of telegraph lines, to provide for the regulation of the same and to secure secresy and fidelity in the transmission of telegraphic messages.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the right and privilege is hereby granted to any person, or company of persons, to construct a telegraph line along the public highways and streets of this state, or across the rivers, or over any lands belonging to the state, free of charge, and over the lands of private individuals, as hereinafter provided, and may erect the necessary fixtures therefor.

SEC. 2. Such fixtures shall not be so constructed as to obstruct any highway, street or navigable stream, nor shall they be set up on the lands of an individual, unless by contract, without paying him for the damages sustained.

SEC. 3. If the person over whose land the telegraph line passes, claims more damages than the owners of the telegraph are willing to pay, the amount of damages may be ascertained as follows: Each party shall select one disinterested person, who, together, shall select a third person, all of whom shall constitute a board of appraisers, who shall proceed, together, to the premises to make such appraisement, and the award of damages by a majority of such board shall be final.

SEC. 4. The award of the board of appraisers referred to in section three, shall be reduced to writing subscribed and sworn to by the appraisers agreeing to the same, and shall be filed in the office of the clerk of the county in which such award is made.

SEC. 5. The claim for damages in all cases by a private individual shall be made within twelve months after the telegraph is erected over his land.

SEC. 6. In consideration of the right of way over public property herein conceded, every telegraph company shall be bound, on application of any officer of this state, or of the United States, in case of any war, insurrection, riot, or other civil commotion, or resistance of public authority, or for the prevention and punishment of crime, or for the arrest of persons suspected or charged therewith, to give to the communications of such officers, immediate dispatch, at the price of ordinary communications of the same length, and if any officer, agent, operator, or employee of any such company, shall refuse, or wilfully omit to transmit such communications as aforesaid, or shall designedly alter or falsify the same, for any purpose whatever, the person so offending shall be liable to indictment, and on conviction, may be fined or imprisoned, at the discretion of the court.

SEC. 7. If any person shall wilfully and maliciously cut, break or throw down, any telegraph pole, or any tree, or other object used in any line of telegraph, or shall wilfully and maliciously break, displace or injure, any insulator in use in any telegraph line, or shall wilfully and maliciously cut, break or remove from its insulators, any wire used as a telegraph line, or shall, by the attachment of a ground wire, or by any other contrivance, wilfully and maliciously destroy the insulation of such telegraph line, or interrupt the transmission of the electric current through the same, or shall in any other manner, wilfully and maliciously injure, molest or destroy, any property or materials, appertaining to any telegraph line, or belonging to any telegraph company, or shall wilfully or maliciously interfere with the use of any telegraph line, or obstruct, or postpone the transmission of any message over the same, or procure or advise, any such injury, interference or obstruction, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine, not to exceed five hundred dollars, or imprisment not to exceed six months, or by both such fine and imprisonment in the discretion of the court; and shall moreover be liable to the telegraph company, whose property is injured or line obstructed, in a sum equal to one hundred times the amount of actual damages sustained thereby.

SEC. 8. If any officer, agent, operator, clerk or employe of any telegraph company, or any other person, shall wilfully divulge, to any other person than the party from whom the same was received, or to whom the same is addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line, or the contents, substance, purport, effect or meaning of such message, or any part thereof, or shall wilfully alter any such message, by adding thereto or omitting therefrom, any word or words, figure or figures, so as to materially change the sense, purport or meaning of such message, to the injury of the person sending or desiring to send the same, or to whom the same was directed, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That when numerals or words of number occur in any message, the operator or clerk sending or receiving, may express the same in words or figures, or in both words and figures, and such fact shall not be deemed an alteration of the message, nor in any manner affect its genuineness, force or validity.

SEC. 9. If any agent, operator, employee, in any telegraph office, or other person, shall, knowingly and wilfully, send by telegraph to any person or persons, any false, or forged message, purporting to be from such telegraph office, or from any other person, or shall wilfully deliver, or cause to be delivered, to any person, any such message, falsely purporting to have been received by telegraph, or if any person, or persons, shall furnish, or conspire to furnish, or cause to be furnished, to any such agent, operator or employee, to be so sent by telegraph, or to be so delivered, any such message, knowing the same to be false, or forged with the intent to deceive, injure, or defraud, any individual, partnership, or corporation, or the public, the person or persons so offending, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.

SEC. 10. If any agent, operator, or employe, in any telegraph office, shall in any way, use, or appropriate any information derived by him from any private message or messages, passing through his hands, and addressed to any other person or persons, or in any other manner acquired by him, by reason of his trust, as such agent, operator, or employe, or shall trade or speculate upon any such information, so obtained, or in any manner turn, or attempt to turn, the same to his account, profit, or advantage, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court, and shall also be liable, in treble damages, to the party aggrieved for all loss or injury sustained by reason of such wrongful act.

SEC. 11. If any agent, operator, or employe, in any telegraph office, shall, unreasonably and wilfully, refuse or neglect to send any message received at such office for transmission, or shall unreasonably or wilfully postpone the same out of its order, or shall unreasonably and wilfully refuse or neglect to deliver any message received by telegraph, the person so offending shall be deemed guilty of a misdemeanor, and may be punished by a fine not to exceed five hundred dollars, or imprisonment not to exceed six months, or by both such fine and imprisonment, in the discretion of the court: *Provided,* That nothing herein contained shall be construed to require any message to be received, transmitted or delivered, unless the charges thereon shall have been paid or tendered, nor to require the sending, receiving, or delivery of any message, counseling, aiding, abetting, or encouraging treason against the government of the United States, or of this state, or other resistance to the lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of crime.

SEC. 12. If any person, not connected with any telegraph office, shall, without the authority or consent of the person or persons to whom the same may be directed, wilfully or unlawfully open any sealed envelope enclosing a telegraphic message, and addressed to any other person, or persons, with the purpose of learning the contents of such message, or shall fraudulently represent any other person or persons, and thereby procure to be delivered to himself any telegraphic message, addressed to such other person or persons, with the intent to use, destroy or detain the same from the person or persons entitled to receive such message, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine or imprisonment, in the discretion of the court, and shall moreover be liable in treble damages to the party injured, for all loss and damage sustained by reason of such wrongful act.

SEC. 13. If any person, not connected with any telegraph company shall, by means of any machine, instrument or contrivance, or in any other manner, wilfully and fraudulently read, or attempt to read, any message, or to learn the contents thereof, whilst the same is being sent over any telegraph line, or shall wilfully and fraudulently or clandestinely learn, or attempt to learn, the contents or meaning of any message, while the same is in any telegraph office, or is being received thereat, or is sent therefrom, or shall use, or attempt to use, or communicate to others, any information so obtained by any person, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine, not to exceed one thousand dollars, or imprisonment, not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.

SEC. 14. If any person shall, by the payment, or promise of any bribe, inducement, or reward, procure, or attempt to procure, any telegraph agent, operator, or employe, to disclose any private message, or the contents, purport, substance, or meaning thereof, or shall offer to any such agent, operator, or employe, any bribe, compensation, or reward, for the disclosure of any private information received by him, by reason of his trust as such agent, operator, or employe, or shall use, or attempt to use, any such information so obtained, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine, not to exceed one thousand dollars, or imprisonment, not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.

SEC. 15. Any person offending against the provisions of section eight, nine, thirteen, or fourteen, of this act, shall, in addition to the penalties therein prescribed, be liable in a civil suit for all damages occasioned thereby.

SEC. 16. All operators, clerks, and persons, in the employ of any telegraph company, whilst employed in the offices of said company, or along the route of its telegraph lines, shall be exempt from militia duty, and from serving on juries, and from any fine or penalty for the neglect thereof.

SEC. 17. Contracts made by telegraph shall be deemed to be contracts in writing; and all communications sent by telegraph, and signed by the person or persons sending the same, or by his or their authority, shall be held and deemed to be communications in writing.

SEC. 18. Whenever any notice, information, or intelligence, written or otherwise, is required to be given, the same may be given by telegraph: *Provided*, That the dispatch containing the same, be delivered to the person entitled thereto, or to his agent or attorney. Notice by telegraph, shall be deemed actual notice.

SEC. 19. Any power of attorney, or other instrument in writing, duly proved or acknowledged, and certified, so as to be entitled to record, may, together with the certificate of proof or acknowledgment, be sent by telegraph, and the telegraphic copy or duplicate thereof, shall, *prima facie*, have the same force and effect, in all respects, and may be admitted to record and recorded in the same manner and with like effect as the original.

SEC. 20. Checks, due bills, promissory notes, bills of exchange, and all orders or agreements for the payment or delivery of money, or other thing of value, may be made or drawn, by telegraph, and when so made or drawn, shall have the same force and effect to charge the maker, drawer, indorser, or acceptor, thereof, and shall create the same rights and equities in favor of the payee, drawee, indorsee, acceptor, holder or bearer thereof, and shall be entitled to the same days of grace as if duly made or drawn, and delivered in writing, but it shall not be lawful for any person, other than the maker or drawer thereof, to cause any such instrument to be sent by telegraph, so as to charge any person thereby. Except as hereinafter, in the next section, otherwise provided, whenever the genuineness or execution of any such instrument received by telegraph, shall be denied, on oath, by the person sought to be charged thereby, it shall be incumbent upon the party claiming under, or alleging the same, to prove the existence and execution of the original writing from which the telegraphic copy or duplicate was transmitted. The original message shall, in all cases, be preserved in the telegraph office from which the same is sent.

SEC. 21. Except as hereinbefore otherwise provided, any instrument in writing, duly certified, under his hand and official seal, by a notary public, commissioner of deeds, or clerk of a court of record, to be genuine, within the personal knowledge of such officer, may, together with such certificate, be sent by telegraph, and the telegraphic copy thereof shall, prima facie only, have the same force, effect and validity, in all respects whatsoever as the original, and the burden of proof shall vest with the party denying the genuineness or due execution of the original.

SEC. 22. Whenever any person or persons shall have been indicted or accused, on oath, of any public offence, or thereof convicted, and a warrant of arrest shall have been issued, the magistrate issuing such warrant, or any justice of the supreme court, or judge of a district or county court, may indorse thereon an order, signed by him, and authorizing the service thereof, by telegraph, and thereupon such warrant and order may be sent by telegraph to any marshal, sheriff, constable, or policeman, and, on the receipt of the telegraphic copy thereof by any such officer, he shall have the same authority, and be under the same obligation to arrest, take into custody, and detain the said person or persons, as if the said original warrant of arrest with the proper direction for its service duly indorsed thereon, had been placed in his hands; and the said telegraphic copy shall be entitled to full faith and credit, and have the same force and effect, in all courts and places, as the original. But prior to indictment or conviction, no such order shall be made by any officer, unless in his judgment there is probable cause to believe the said accused person or persons, guilty of the offence charged: *Provided,* The making of such order by any officer, as aforesaid, shall be prima facie evidence of the regularity thereof, and of all proceedings prior thereto. The original warrant and order, or a copy thereof, certified by the officer making the order, shall be preserved in the telegraph office from which the same is sent, and, in telegraphing the same, the original, or the said certified copy, may be used.

SEC. 23. Any writ or order in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner and with the same force and effect, in all respects, as the original thereof might be if delivered to him, and the officer or person serving or executing the same, shall have the same authority, and be subject to the same liabilities, as if the said copy were the original. The original, when a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or a certified copy may be used by the operator for that purpose.

SEC. 24. Whenever any document to be sent by telegraph bears a seal either private or official, it shall not be necessary for the operator, in sending the same, to telegraph a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S.," or by the word "seal."

SEC. 25. The president or secretary of any telegraph company in this state may file in the office of the clerk of the county court in which the principal office of said county is situated, a copy of any printed blank or envelope, picture or device, used or intended to be used, by said company, with his certificate that the same is commonly used, or is intended so to be, in the business of said company, as a distinguishing mark, notice or index of said business, and thereupon such blank, envelope, picture or device, shall become the property of said company, and it shall not be lawful for any person, unless by the employment or permission of said company, to print, publish, distribute or use, or cause to be printed, published, distributed or used, either of them, or any copy, counterfeit or imitation thereof. Any person wilfully offending against the provisions of this section, may be punished by a fine not to exceed five hundred dollars, or imprisonment not to exceed six months.

SEC. 26. It shall be the duty of any telegraph company doing business in this state, to transmit all dispatches in the order in which they are received, except as provided in section six of this act, under the penalty of one hundred dollars, to be recovered, with costs of suit, by the person or persons whose dispatch is postponed out of its order: *Provided*, That communications from other telegraphic lines, in connection with lines in this state, may have precedence over all ordinary private communications; and provided, also, that intelligence of general and public interest may be transmitted, for publication, out of its order.

SEC. 27. The term "telegraphic copy," or "telegraphich duplicate," wherever used in this act, shall be construed to mean any copy of a message, made or prepared for delivery, at the office to which said message may have been sent by telegraph.

SEC. 28. Inasmuch as immediate protection is needed to a telegraph line now being constructed in this state, this act shall take effect and be in force from and after its approval by the Governor.

Passed the House of Representatives, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 17, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the safe keeping and treatment of insane and idiotic persons.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, That the governor of the state of Oregon is hereby authorized and appointed to make a contract with some suitable person or persons, in the state of Oregon, for the safe keeping, care and medical treatment of all insane and idiotic persons in this state: *Provided*, Such contract can be made on such terms as to him may seem reasonable and just.

SEC. 2. The several county courts, in their respective counties in this state, shall have power to appoint guardians to take care, custody and management of the estates, real and personal, of all insane persons, idiots and all who are incapable of conducting their own affairs, and the maintenance of their families and the education of their children.

Sec. 3. The county judge of any county in this state shall, upon application of any citizen in writing, setting forth that any person or persons, by reason of insanity or idiocy, as the case may be, is suffering from neglect, exposure or otherwise, or is unsafe to be at large, or is suffering under mental derangment, shall cause said person or persons to be brought before him, at such time and place as he may direct, and the said county judge shall also cause to appear, at the same time and place, one or more competent physicians, who shall proceed to examine the person alleged to be insane or idiotic; and if said physician or physicians, after careful examination, shall certify upon oath that the said person or persons are insane or idiotic, as the case may be, then such judge shall cause the said insane or idiotic person to be conveyed to, and placed in charge of, the parties contracting to keep such persons: *Provided,* An appeal shall lie from the county court in such cases in the same manner as is provided for appeals from county courts in other cases: *Provided, further,* That no insane or idiotic person shall be sent to an insane asylum, under the provisions of this act, who has friends that can, or desire to, provide for their safe keeping and medical treatment. The county judge shall also cause inquiry to be made into the ability or inability of such insane or idiotic person to bear the charge or expense, for the time they may remain under treatment, and shall certify the result to the secretary of state, and in those cases where the person possesses the ability to pay the charges or expense or whose friends or relatives are willing to pay said charge or expense, the said judge shall cause to be placed in the hands of the secretary of state the amount of two months' expenses, in said asylum, in advance, and regularly every two months thereafter, so long as said person shall continue in said asylum. But the indigent insane, and idiotic, as the case may be, shall, in all cases, be maintained at the expense of the state.

Sec. 4. The county sending the insane or idiotic person, shall, in all cases where the person is indigent, be at the expense of such conveyance.

Sec. 5. Patients shall pay according to the terms made with the contractors, which, in all cases, shall be reasonable, and in proportion to the care and treatment required for them by their friends, or guardians; but the insane or idiotic indigent shall, in all respects, receive the same medical care and treatment, and no record of debt shall be made against them.

SEC. 6. The courts of this state shall have power to commit to the care of said contractors any person who may have been charged with an offence punishable by imprisonment or death, who shall have been found to be insane or idiotic, and who shall continue to be insane or idiotic.

SEC. 7. Whenever any convict confined in the state prison shall, in in the opinion of the physician of the prison be insane, or idiotic, the physician shall make oath to the same before the county judge of the county in which the said prison is located, and said judge shall summon one or more competent physicians to examine the alleged case of insanity, or idiocy, and if, in their opinion, the said convict is of unsound mind, the judge shall send the statement of said physician, with his own opinion, to the governor, who is hereby authorized at his discretion, to remove, or cause to be removed, said convict to the place provided for the insane and idiotic.

SEC. 8. The governor is hereby required to visit said institution once every six months, and examine the same. He shall also appoint two or more competent physicians, who shall, at such times as he may direct, visit the asylum and inspect the condition of the inmates, and a true report render of the same, and such patients as are shown by such report, to be sufficiently restored to reason as to warrant their discharge, shall forthwith be ordered released by the governor, and the contractors are required to exhibit at such times, and also to any committee appointed by the legislature for such purpose, all patients, books and papers belonging to said institution.

SEC. 9. The contractors shall make a report to the governor before the meeting of the legislature, showing the general condition of the institution, the number of patients admitted during the year, the number remaining at the date of the report, the number of deaths, the number discharged, and otherwise, and such other matters as they may deem advisable or instructive.

SEC. 10. A copy of the contract mentioned in section first of this act, shall be duly attested, and filed in the office of secretary of state, and the governor is hereby authorized to cause the contracting parties to enter into bonds to the state of Oregon, with approved security, in such sums as the governor may from time to time demand, for the faithful performance of the agreement therein specified.

SEC. 11. The secretary of state is hereby authorized and required to draw his warrant upon the state treasury in favor of said contractors for all moneys due them as per contract, and the state treasurer is hereby authorized and required to pay the same out of any moneys in his hands belonging to the general fund not otherwise appropriated.

SEC. 12. All laws or parts of laws in conflict with the provisions of this act are hereby repealed.

SEC. 13. This act to take effect, and be in force from and after its passage in consequence of a number of indigent insane and idiotic person needing immediate care and attention.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED September 27, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act for the taking up and disposal of estrays.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That it shall be the duty of the county clerk of each county in this state to keep a book of suitable dimensions, to be called the record of estrays.

SEC. 2. Any householder about whose premises any estray may be in the habit of running at large, may take up the same, and shall immediately post notices in three public places in the county, one of which shall be in the precinct in which the estray was taken up, giving as correct a description as may be of natural and artificial marks, probable age, size, &c.: *Provided,* That no estray shall be taken up in the months of May, June, July, August, September, October and November.

SEC. 3. If previous to the expiration of ten days from taking up, the owner shall prove said estray to be his, he shall be entitled to the same by paying charges, which shall be one dollar for taking up, posting &c., and a reasonable rate for keeping the same. And if the owner shall further prove that the person so posting an estray knew to whom such estray belonged, and yet did not notify the owner of his intention to post said estray, the person so taking and posting, shall not recover for either posting or keeping.

Sec. 4. If at the expiration of ten days, no one shall have made his claims known to the taker up, it shall be his duty to make a statement to the nearest justice of the peace of the county in which such estray is taken up, under oath, of the taking up of such estray, posting, &c., according to law; whereupon, the justice of the peace shall appraise the estray, and immediately notify the county clerk of the same county, by letter or otherwise, that an estray has been taken up, with marks natural and artificial &c., and by whom. And such justice shall receive for each appraisal and notification, one dollar, and ten cents for every mile necessarily traveled in such service: *Provided*, That there shall be no charge of appraising on more than three head at the same time and place.

Sec. 5. It shall be the duty of the county clerk, upon receiving such notice from the justice, to make record of the same in the record of estrays.

Sec. 6. If the amount of such appraisement shall exceed fifteen dollars, the person taking up such estrays shall be further required to cause to be published in the newspaper published by the state printer, which shall be kept on file in the clerk's office of each county of this state, a description of the same, giving marks as above specified, the name and residence of the finder, and as near as may be, the time at which the estray was taken up.

Sec. 7. If the owner or any person entitled to the possession of any estray, shall appear and make out his title thereto, and pay the charges thereon, within six months from the time the notice is filed with the county clerk, as provided in section fifth of this chapter, and make out his right thereto, he shall have such estray restored to him upon paying all lawful charges which have been incurred in relation to the same.

Sec. 8. If the person entitled to the possession of any estray shall not appear and make out his title thereto, and pay the charges thereon, within six months, from the time the notice is filed with the county clerk, as provided in said section sixth, such estray shall be sold at the request of the finder, by any sheriff or constable of the precinct, at public auction, upon first giving public notice thereof in writing, by posting up the same in three public places in the precinct, at least ten days before such sale, and the finder may bid therefor at such sale, and after deducting all the lawful charges of the finder as aforesaid, and the fees of the sheriff or constable, which shall be the same as upon a sale on an execution, the remaining proceeds of such sale shall be deposited in the treasury of the county for the use of common schools: *Provided*, That if the owner of the property sold, or his legal representatives shall, within one year after the money shall have been deposited in the county treasury, furnish satisfactory evidence to the county judge of the ownership of such property, he or they shall be entitled to receive the amount so deposited in the county treasury: *Provided, however*, That the taker up of estrays shall forfeit all right to a consideration for taking up, posting, and subsisting the same, if he work or in any way use such estray or take and keep the same out of the county in which such estray was taken up more than three days at any one time.

Sec. 9. That if any person shall take up, keep or use any estray without complying with the provisions of this act, he shall be liable to damage in double the value of such estray, to be sued for and recovered in any court having competent jurisdiction at the suit of the county treasurer for the use of the county wherein such animals shall be found, and it is hereby made the duty of said county treasurer to prosecute a suit against such offender for the violation of the provisions of this act when the same shall be within the personal knowledge of said treasurer, or when complaint in writing under oath be filed with said treasurer, alleging the violation of this act.

Sec. 10. All laws heretofore enacted relating to estrays are hereby repealed.

Passed the House of Representatives, October 7, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 14, 1862.

WILSON BOWLBY,
President of the Senate.

Approved, October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to consolidate the counties of Douglas and Umpqua into one county, under the name of Douglas county, and to define the boundaries thereof.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, That all that portion of territory hitherto embraced within the boundaries of the counties of Douglas and Umpqua be, and the same are hereby, united, and consolidated into one county, under the name, organization and jurisdiction of Douglas county.

SEC. 2. The boundaries of the said county of Douglas, from and after the going into effect of this act, shall be as follows: Commencing on the Pacific coast, at the mouth of the Siuslaw, on south bank, thence, following up the south bank of said stream, to a point fifteen miles west of the main traveled road, known by the name of the Applegate road; thence, southerly, to the summit of the Calapooia mountains; thence eastward, along the summit of said mountains to the summit of the Cascade range; thence southerly, along the summit of the Cascade range to the former corner of Douglas county; thence, continuing southerly, along the summit of the Cascade range, to the summit of the dividing ridge, between the head waters of south Umpqua river, and the waters of Rogue river; thence westerly, along the summit of said ridge, to the summit of the coast range of mountains, separating the waters of Coquilla and Couse rivers from the Umpqua; thence northerly, along the summit of said coast range, to a point where the south line of the former county of Umpqua crosses said coast range; thence due west, to the Pacific ocean; and thence northerly along the coast to the place of beginning.

SEC. 3. All taxes and public dues, of whatever nature, due from the inhabitants of the former county of Umpqua at the time of the going into effect of this act, shall be payable to the authorities of the county of Douglas, and be collected by them the same as like taxes and dues are collected in other parts of the county; and all actions, suits and proceedings at that time pending and undetermined, in the courts of the said former county of Umpqua, shall be transferred to the courts in Douglas county, as the same now exist, and proceeded upon as if the same had been originally commenced in such county of Douglas; and all books, maps, charts, records and files, pertaining to county offices, in the said former county of Umpqua, shall be transferred to the county seat of Douglas county, and deposited in the offices of such county, corresponding to the offices in the former county of Umpqua, from which they shall be taken, and all county offices existing in the said former county of Umpqua are hereby abolished.

SEC. 4. This act shall be in force and take effect from and after the first Monday in July, 1863, at which time the county judge of the former county of Umpqua shall deliver all matters and things pertaining to his office, and specified in this act, to the county judge of Douglas county, at the same time, the sheriff of the said former county of Umpqua shall deliver up all public matters, moneys and things in his office or possession, to the sheriff of Douglas county, at the same time the treasurer of the said former county of Umpqua shall deliver up to the treasurer of Douglas county all public matters, moneys and things in his office or hands, and all other county officers of the said former county of Umpqua shall deliver up to the like officers of Douglas county all public matters, papers, moneys and things, and thereafter all dues, debts, accounts, orders and demands upon the former county of Umpqua shall be assumed by the county of Douglas as herein defined.

SEC. 5. The act entitled "an act to create and organize the county of Umpqua," passed January 24, 1851, is hereby repealed.

Passed the House of Representatives October 14, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY.
President of the Senate.

APPROVED October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to accept the proposition of the congress of the United States granting lands to the state of Oregon for agricultural colleges.

Whereas: The congress of the United States did pass an act in effect following, to wit: An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts:

SECTION 1. *Be it enacted by the senate and house of representatives* *of the United States of America in congress assembled,* That there be granted to the several states, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each state, in quantity equal to 30,000 acres for each senator and representative in congress, to which the states are respectively entitled by the apportionment under the census of 1860: *Provided,* That no mineral lands shall be selected or purchased under the provisions of this act.

SEC. 2. *And be it further enacted,* That the land aforesaid, after being surveyed, shall be apportioned to several states in sections or subdivisions of sections, not less than one quarter of a section; and whenever there are public lands in a state subject to sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said state shall be entitled, shall be selected from such lands within the limits of such state, and the secretary of the interior is hereby directed to issue to each of the states in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said state may be entitled under the provisions of this act, land scrip to the amount in acres for the deficiency of its distributive share; said scrip to be sold by said state, and the proceeds thereof applied to the uses and purposes prescribed in this act, and for no other use or purpose whatsoever: *Provided,* That in no case shall any state to which land scrip may thus be issued be allowed to locate the same within the limits of any other state, or of any territory of the United States; but their assignees may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at one dollar and twenty-five cents per acre, and: *Provided, further,* That not more than one million acres shall be located by such assignees in any one of the states, and: *Provided, further,* That no such locations shall be made before one year from the passage of this act.

SEC. 3. *And be it further enacted,* That all the expenses of management and superintendence and taxes from date of selections of said lands, previous to their sale, and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the states to which they may belong out of the treasury of said states, so that the entire proceeds of the sale of said lands shall be applied, without any diminution whatever to the purposes hereinafter mentioned.

SEC. 4. *And be it further enacted,* That all moneys derived from the sale of lands aforesaid, by the states to which the lands are apportioned, and from the sale of land scrip hereinbefore provided for shall be invested in stocks of the United States, or of the states, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the money so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this act,) and the interest of which shall be inviolably appropriated by each state which may take and claim the benefit of this act, to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to Agriculture and the mechanic arts, in such manner as the legislature of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

SEC. 5. *And be it further enacted*, That the grant of land and land scrip hereby authorized, shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several states shall be signified by legislative acts:

1. If any portion of the fund invested as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the state to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any state under the provision of this act, may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said states.

2. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation or repair of any building or buildings;

3. Any state which may take and claim the benefit of the provisions of this act shall provide, within five years, at least not less than one college, as described in the fourth section of this act, or the grant to such state shall cease; and said state shall be bound to pay the

United States the amount received of lands previously sold, and that the title to purchase under the state shall be valid;

4. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, with their costs and results, and such other matters, including state industrial and economical statistics as may be supposed useful, one copy of which shall be transmitted by mail free, by each, to all the other colleges which may be endowed under the provisions of this act, and also one copy to the secretary of the interior;

5. Where lands shall be selected from those which have been raised to double the minimum price in consequence of railroad grants, they shall be computed to the states at the maximum price, and the number of acres proportionally diminished;

6. No state, while in a condition of rebellion or insurrection, against the government of the United States, shall be entitled to the benefit of this act;

7. No state shall be entitled to the benefit of this act unless it shall express its acceptance thereof by its legislature, within two years from the date of its approval by the president.

SEC. 6. *And be it further enacted,* That land scrip issued under the provisions of this act, shall not be subject to location until after the first day of January, 1863.

SEC. 7. *And be it further enacted,* That the land officers shall receive the same fees for locating land scrip issued under the provisions of this act as is now allowed for the location of military bounty land warrants under existing laws: *Provided,* That maximum compensation shall not be thereby increased.

SEC. 8. *And be it further enacted,* That the governor of the several states to which scrip shall be issued under this act, shall be required to report annually to congress all sales made of such scrip until the whole shall be disposed of, the amount received for the same, and what appropriation has been made of the proceeds; therefore

SEC. 1. *Be it enacted by the legislative assembly of Oregon,* That each and all of the propositions in said act of congress, offered to the state of Oregon are hereby irrevocably adopted with all the conditions and obligations therein contained.

SEC. 2. Whereas, the time for acceptance of said proposition will expire before the next regular session of the legislature of Oregon, there being no law accepting the same, and whereas, it is expedient to make provision for locating said lands as soon as possible, therefore this act shall take effect and be in force from and after its passage.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED October 9, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the ordinary expenses of the state government, and other general and specific appropriations.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the following sums be, and the same are hereby, specifically appropriated to the several objects heinafter mentioned, for two years, commencing on the second Monday of September, Anno Domini, one thousand eight hundred and sixty-two, to be paid out of any money in the treasury not otherwise appropriated.

SEC. 2. For the salary of governor of the state, three thousand dollars;

For the salary of secretary of state three thousand dollars;

For the salary of treasurer of state, sixteen hundred dollars;

For the salary of the private secretary of the governor, eight hundred dollars;

For the salary of the assistant secretary of state, eight hundred dollars;

For the salary of the state librarian, three hundred dollars;

For such allowances of per diem and mileage to the governor of the state, secretary of state and treasurer of state, as has been, or may be, provided by law, three thousand dollars, or as much thereof as may be necessary.

SEC. 3. For the salary of the justices of the supreme court, twenty thousand dollars;

For the salary of prosecuting attorneys, five thousand dollars;

For the salary of pilot commissioners, seven hundred dollars, or as much thereof as may be necessary.

SEC. 4. For the payment of the expenses of conveying convicts to the penitentiary, eight thousand dollars, or as much thereof as may be necessary.

Sec. 5. For the payment of the expenses of the legislative assembly, including the pay and mileage of members, clerks and officers thereof, ten thousand dollars, or as much thereof as may be neccessary.

For rents, stationery, lights, fuel and other incidental expenses of the executive and legislative departments, seven thousand dollars, or as much thereof as may be necessary.

Sec. 6. For the public printing, folding, stiching and binding, seven thousand five hundred dollars, or as much thereof as may be necessary.

Sec. 7. For the support and medical treatment of the indigent insane and idiotic, twenty thousand dollars, or as much thereof as may be necessary.

Sec. 8. For the payment of the expenses of the support of the penitentiary, salaries of its officers and all incidental expenses, thirty thousand dollars, or as much thereof as may be necessary.

Sec. 9. The sum of five thousand dollars is hereby placed at the disposal of the governor of the state, to be expended, at his discretion, for the organization of the militia of the state.

Sec. 10. That all salaries herein provided for, shall be paid quarterly at the office of the state treasurer, unless otherwise specified by law, that no money appropriated by this act for any specific purpose shall be applied to any other purpose in any of the departments, or objects, of appropriation herein provided for.

Sec. 11. Owing to the public exigencies, this act shall take effect and be in force from and after its approval by the governor.

Passed the House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY,
President of the Senate.

Approved October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to regulate partition fences.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That whenever a fence, of whatever materials constructed, and in all respects such as a good husbandman ought to keep, is, or shall be hereafter, erected by any person on the line of his land, or that on which he may have a lease for one or more years, and the person owning the land adjoining thereto, or holding a lease on the same for one or more years, shall make, or cause to be made, or have an inclosure on the opposite side of such fence, so that such fence may answer the purpose of inclosing his field, meadow, lot or any other inclosure, such person shall pay the owner of such fence already erected, one-half of the value of so much thereof as serves as a partition fence, such value to be determined by the parties, or in case they cannot agree, then by two persons whom they may select, who, if failing to agree, may select a third person, and such three persons shall determine such value, and the amount so adjudged, if not paid within one month after so adjudged, may be recovered in a civil action, before any court having competent jurisdiction, in the name of and for the use of, the owner of such fence, with costs of suit.

SEC. 2. If any party neglect to repair or rebuild such partition fence, or the portion thereof which he ought to maintain, the aggrieved party may complain to a justice of the peace, who, after due notice to each party, shall examine the same, and if he determine the fence to be insufficient, he shall signify in writing to the delinquent occupant of the land, and direct him to repair or rebuild the same within such time as he shall judge to be reasonable.

SEC. 3. If such fence be not repaired or rebuilt accordingly, the complainant may repair or rebuild it and recover the value thereof from such delinquent, before any court having competent jurisdiction.

SEC. 4. When one party shall cease to improve his land, or shall open his enclosure, he shall not take away any part of the partition fence belonging to him and adjoining the next enclosure, if the owner or occupant of such adjoining enclosure will, within two months after the same shall be ascertained, pay therefor such sum as shall be agreed upon by the parties, or, if failing to agree, then such sum as may be adjudged by two or more disinterested persons, as provided in section one. Nor shall such partition fence be removed, when, by so doing, it will expose to destruction any crops in such enclosures.

SEC. 5. When any person has built, or shall hereafter build, by mistake and in good faith, a fence on the land of another, such person or his successor in interest may, within one year from the time of discovering such mistake, go upon the land of such other person and remove such fence, doing no unnecessary damage thereby.

SEC. 6. The occupant or owner of land whereon a fence has been built by mistake, shall not throw down or in any manner disturb such fence during the period which the person who built it is authorized by the last section to remove it.

SEC. 7. The person building such fence, or the occupant or owner of the land whereon the same is built, may, upon notice to the other party whenever doubts arise about the location of such fence, require the surveyor of the county to run the division line between their respective lands, and the line so run shall be sufficient notice to the party making the mistake, so as to require him to remove such fence within one year thereafter.

SEC. 8. In all cases where the inclosures of two or more persons shall be divided by a partition fence of any kind, and either of the parties shall think proper to vacate his part of such inclosure, or to make a lane or passage between such adjoining inclosures, such person shall be at liberty to remove his share or part of such partition fence, on giving six months' notice in writing, of such intention, to the party owning or occupying the adjoining inclosure, or to his agent, if such party is not a resident of the county.

SEC. 9. In all cases where a partition fence exists between parties, and a gate is established for passage through their lands, any other person may pass through such gate free, doing no unnecessary damage, and if any such person shall leave any such gate open, or do other damage to the premises, he shall be liable to the party aggrieved to double damages.

SEC. 10. Inasmuch as there is no law on this subject, this act shall take effect and be in force from and after its approval by the governor.

Passed the Senate, October 13, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the purchase and distribution of the reports of the decisions of the supreme court of Oregon.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That there be appropriated out of any money in the treasury not otherwise appropriated, the sum of eight hundred dollars for the purchase of one hundred copies of the first volume of the reports of the decisions of the supreme court of Oregon, for the use of this state.

SEC. 2. That upon the depositing of the said one hundred copies with the librarian of this state, by J. G. Wilson, supreme court reporter, the secretary of state, issue to said Wilson a warrant upon the treasury for said eight hundred dollars.

SEC. 3. That upon the reception of said copies, the secretary of state forward one copy thereof to each of the circuit and district judges of the United States courts, to the attorney general of the United States, to the commissioner of the general land office, and to the governor of each state, now supporting the government of the United States, and one copy to each of the judges of the county courts in this state, for the use of said court.

SEC. 4. In view of the necessity for the circulation of the reports, this act shall take effect and be in force from and after its approval by the governor.

Passed the House of Representatives September 27, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate October 6, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 11, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide the times for holding circuit and county courts.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the terms of the circuit courts of the several judicial districts of this state, shall be held annually, as follows:

In the first judicial district in the county of Josephine, on the second Monday in April, and the fourth Mondays in October. In the county of Jackson on the second Mondays in February, June and November. In the county of Douglas on the second Mondays of May and October.

In the second judicial district, in the county of Curry, on the first Monday in June; in the county of Coos, on the fourth Monday in May; in the county of Umpqua, on the third Monday in June; in the county of Lane, on the third Monday in April and on the fourth Monday in October; in the county of Benton, on the second Mondays in April and November.

In the third judicial district, in the county of Linn, on the fourth Mondays in March and October; in the county of Marion, on the second Mondays in March and October; in the county of Polk, on the fourth Monday in April and third Monday in November; in the county of Yamhill, on the second Mondays in April and November.

In the fourth judicial district, in the county of Clackamas, on the third Monday in March and October; in the county of Multnomah, on the second Mondays in February, June and November; in the county of Columbia, on the third Tuesday in April; in the county of Clatsop, on the fourth Tuesday in April, and the fourth Tuesday in September; in the county of Washington, on the third Monday of May, and second Monday in October.

In the fifth judicial district in the county of Wasco, on the second Tuesdays in May and December; in the county of Umatilla, on the first Monday in June, and the second Monday in November; in the county of Baker, on the third Monday in June, and the fourth Monday in October.

SEC. 2. That terms of the county courts of the several counties shall be held as follows: In the county of Josephine, on the first Mondays in January, April, July and September; in the county of Jackson, on the first Mondays in each month; in the county of Douglas, on the first Mondays in each month; in the county of Curry, on the first Mondays in January, April, July and September; in the county of Coos, on the first Mondays in January, April, July and September; in the county of Umpqua, on the first Mondays in January, April, July and September; in the county of Lane, on the first Mondays in each month; in the county of Benton, on the first Mondays in each month; in the county of Linn, on the first Mondays in each month; in the county of Marion, on the first Mondays in each month; in the county of Polk, on the first Mondays in each month; in the county of Yamhill, on the first Mondays in each month; in the county of Washington, on the first Mondays in each month; in the county of Clackamas, on the first Mondays in each month; in the county of Multnomah, on the first Mondays in each month; in the county of Columbia, on the first Mondays in January, April, July and September; in the county of Clatsop, on the first Mondays in January, April, July and September, ; in the county of Tillamook, on the first Mondays in January, April, July and September; in the county of Wasco, on the first Mondays in each month; in the county of Umatilla, on the first Mondays in January, April, July and September; in the county of Baker, on the first Mondays in each month.

Sec. 3. That the following acts, now in force, are hereby repealed, to wit:

"An act to fix the times and places of holding the terms of the supreme and circuit courts," approved June 3d, 1859.

"An act to fix the times of holding the terms of the circuit courts of the first judicial district," approved October 12th, 1860.

"An act to fix the times of holding the terms of the circuit court in Umpqua county," approved October 12th, 1860.

"An act to amend the act to fix the times and places of holding the terms of supreme and circuit courts, so far as relates to the circuit courts in Wasco county," approved October 19th, 1860.

That section 24 of an act entitled "an act to organize the county courts, and defining the jurisdiction and the duties of the judges thereof," approved June 4th, 1859, is hereby repealed.

That so much of the act entitled "an act to regulate the terms of circuit and county courts in Columbia county, and to fix the salaries of county judges," approved October 19th, 1859, as conflicts with this act, is hereby repealed.

Passed the House of Representatives October 15, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY.
President of the Senate.

Approved October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to regulate the penitentiary of Oregon.

SECTION 1. *Be it enacted by the legislative Assembly of the state of Oregon,* That the governor of this state be and he is hereby appointed superintendent of the penitentiary of Oregon, and as such he shall have the general superintendence of the penitentiary, make all purchases of supplies necessary for keeping and maintaining the convicts, and have full power to authorize the employment of all or any number of the convicts by any person or persons he may deem proper. He shall also have power to appoint a warden and assistant warden of the penitentiary, and to remove them at pleasure.

SEC. 2. It shall be the duty of the superintendent to examine into the general affairs of the penitentiary at least once in every three months, and all his necessary expenses in going and returning, and all other expenses necessarily incurred by him while in discharge of his duties as superintendent shall be audited and allowed by the secretary of state, and paid out of the state treasury. And in addition thereto he shall be allowed a salary of four hundred dollars per annum, to be audited and paid in like manner, said expenses and salary to be audited and paid quarterly.

SEC. 3. The warden shall be entitled to receive the sum of one thousand dollars per annum, and the assistant warden the sum of six hundred dollars per annum to be paid in quarterly instalments out of the state treasury.

SEC. 4. It shall be the duty of the warden to receive from the sheriffs of the different counties in this state all persons who now are, or hereafter may be sentenced to the penitentiary, give receipts therefor, and keep all convicts safely according to law. He shall keep the books and records of the penitentiary, and shall cause them to be so kept as clearly to exhibit the state of the convicts, the number employed and by whom, and the amount of their earnings, the expenditures of the institution, specifying minutely the persons to whom moneys paid, and from whom moneys are received, and at the end of each month he shall make a report thereof to the superintendent of the penitentiary.

SEC. 5. The warden shall keep all the convicts, (except those farmed out by authority of the superintendent,) employed in some suitable work in and about the penitentiary. He shall have power to regulate and control the internal police of the penitentiary so far as shall be necessary to secure the safety, health and discipline of the convicts therein confined, to visit them at all times, to see that they are supplied with suitable clothing and with healthy coarse food, with such proportion of meat and vegetables as he may deem best. But no tea, coffee, sugar, spirituous, malt or vinous liquors, or any article of luxury shall be allowed to any convict except it be necessary for his or her health.

Sec. 6. The warden shall take care that all the convicts employed by any person under the authority of the superintendent, be properly confined every night; and in case of the escape of any convict from the custody of the person having him employed, or from the custody of the warden, it shall be the duty of such warden to notify the superintendent without delay of that fact, and also to use all reasonable means to have such escaped convict apprehended and retaken to the penitentiary. It shall also be the duty of the warden to prevent all persons from having communication with or access to any convict except it be in the presence of the warden or assistant warden.

Sec. 7. It shall be the duty of the assistant warden to aid and assist the warden in the discharge of his duties under this act, and in case of the absence, sickness, or other inability of the warden to discharge such duties, the same shall devolve upon and be discharged by the assistant warden.

Sec. 8. Before entering upon the discharge of their duties the warden and assistant warden shall each give a bond to the state of Oregon with one or more sureties in the sum of five thousand dollars, to be approved by the superintendent of the penitentiary, conditioned that he shall faithfully discharge his duties as warden or assistant warden. The warden, assistant warden, and employees in the penitentiary shall also take an oath before entering upon their duties, that they will support the constitution of the United States and of this state, and faithfully perform the duties of their respective offices, or situations according to law, and such oath of the warden and assistant warden may be entered on their official bond.

Sec. 9. Neither the superintendent, warden or assistant warden shall have any authority to work any convict for his own use, nor shall either the warden or assistant warden enter into any contract for supplies for the convicts, or for any other purpose connected with the discharge of their duties as such officers, unless upon the authority or approval of the superintendent. And no officer of the penitentiar shall be interested in any such contract.

Passed the Senate, October 16, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for limited partnerships,

LIMITED PARTNERSHIPS.

SEC. 1. For what purposes limited partnerships may be formed,
2. General and special partners, their liabilities.
3. Mode of forming partnership.
4. Same subject.
5. Mode of renewing or continuing limited partnerships.
6. Name of the firm, and when special partner to [be] deemed general partner.
7. When special partners liable for amount of capital stock withdrawn.
8. Actions or suits to be by or against general partners only, except in certain cases.
9. How partnership dissolved.
10. Liabilities and rights of partners, where not specially provided for.

SECTION 1. *Be it enacted by the legislative assembly of the State of Oregon*, as follows: Limited partnerships for the transaction of mercantile, mechanical, or manufacturing business may be formed within this state, by two or more persons, upon the terms and subject to the conditions and limitations, contained in this act.

SEC. 2. A limited partnership may consist of one or more persons, who are known and called general partners, and are jointly and severally liable, as general partners now are by law, and of one or more persons who shall contribute to the common stock a specific sum in actual money, as capital, and are known and called special partners, and are not personally liable for any debts of the partnership, except, as in this act specially provided.

SEC. 3. The persons forming such partnerships shall make and severally subscribe a certificate, in duplicate, and file one of such certificates with the clerk of the county in which the principal place o business of the partnership is to be. Before being filed the execution of such certificate shall be acknowledged by each partner subscribing it before some officer authorized to take acknowledgments of deeds: and such certificate shall contain the name assumed by the partnership and under which its business is to be conducted, the names and respective places of residence of all the general and special partners, the amount of capital which each special partner has contributed to the common stock, the general nature of the business to be transacted, and the time when the partnership is to commence, and when it is to terminate.

SEC. 4. Such partnership cannot commence before the filing of the certificate of partnership, and if a false statement is made in such certificate, all the persons subscribing thereto, are liable as general partners, for all the debts of the partnership. The partners shall, for four successive weeks immediately after the filing of the certificate of partnership, publish a copy of the same in some weekly newspaper published in the county where the principal place of business of the partnership is, or if no such paper be published therein, then in some weekly newspaper in general circulation therein, and until such publication is made and completed, the partnership is to be deemed general.

SEC. 5. A limited partnership may be continued or renewed by making, acknowledging, filing and publishing a certificate thereof, in the manner provided in this act, for the formation of such partnership originally, and every such partnership not renewed or continued as herein provided, from and after the expiration thereof according to the original certificate, shall be deemed a general partnership.

SEC. 6. The business of the partnership shall be conducted under a name, in which the names of the general partners only shall be inserted, without the addition of the word company or any other general term. If the name of any special partner is used in such firm with his consent or privity, he shall be deemed and treated as a general partner, or if he personally makes any contract respecting the concerns of the partnership, with any person except the general partners, he shall be deemed and treated as a general partner in relation to such contract, unless he makes it appear that in making such contract he acted and was recognized as as pecial partner only.

SEC. 7. During the continuance of any partnership formed under this act, no part of the capital stock thereof shall be withdrawn, nor any division of interests or profits be made, so as to reduce such capital stock below the sum stated in the certificate of partnership before mentioned; and if at any time during the continuance or at the termination of such partnership, the property or assets thereof are not sufficient to satisfy the partnership debts, then the special partners shall be severally liable for all sums or amounts by them in any way received, or withdrawn from such capital stock, with interest thereon, from the time they were so received or withdrawn respectively.

SEC. 8. All actions, suits or proceedings respecting the business of such partnership, shall be prosecuted by and against the general partners only; except in those cases where special partners, or partnerships, are to be deemed general partners or partnerships, in which case all the partners deemed general partners may join or be joined therein; and excepting, also, those cases where special partners are severally liable on account of sums or amounts received or withdrawn from the capital stock as provided in section seven.

SEC. 9. No dissolution of a limited partnership shall take place except by operation of law, before the time specified in the certificate of partnership, unless a notice of such dissolution, subscribed by the general and special partners, is filed with the original certificate of partnership, or the certificate, if any renewing or continuing such partnership, nor unless a copy of such notice be published for the time and in the manner prescribed for the publication of the certificate of partnership.

SEC. 10. In all cases not otherwise provided for in this act, all the members of limited partnerships shall be subject to all the liabilities, and entitled to all the rights of general partners.

Passed the Senate, October 14, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House of Representatives, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to authorize the purchase of safes for the use of the state.

SECTION 1. *Be it enacted by the legislative assembly of the state of Ore-*

gon, That the secretary of state and the state treasurer are each hereby authorized to purchase for the use of their respective offices, a fire and burglar-proof safe, with satisfactory guaranties of their efficiency.

SEC. 2. To carry out the provisions of section 1, the sum of eight hundred dollars or so much thereof as may be necessary, be and the same is hereby appropriated, and when such purchase is made, the secretary of state shall draw his warrant upon the treasury for the amount of such purchase, together with the expense of transportation.

SEC. 3. Inasmuch as the state is liable to great loss for the want of such safes, this act shall be in force from and after its approval by the governor.

Passed House of Representatives, October 10, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed Senate, October 13, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for taxing negroes, Chinamen, kanakas and mulattoes.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, That each and every negro, Chinaman, kanaka and mulatto, residing within the limits of this state, shall pay an annual poll tax of five dollars, for the use of the county in which such negro, Chinaman, kanaka and mulatto may reside.

SEC. 2. That every such negro, Chinaman, kanaka and mulatto, shall, between the first day of January and the first day of March, of each year, pay to the county treasurer of the county in which he may reside, the sum of five dollars, and thereupon said treasurer shall make out and deliver to such person a receipt which shall be in substance as follows:

STATE OF OREGON, }
COUNTY OF ———, }

Received of ——, [negro, Chinaman, kanaka or mulatto as the case may be,] the sum of five dollars, being his tax for the year 18—, Witness my hand, and dated this —— day of ——, A.D., 18—.

[Signed] —— ——,

County Treasurer.

And such receipt shall be a protection to such tax payer from again paying such poll tax in the same or any other county of this state, for such year.

SEC. 3. When such negro, Chinaman, kanaka and mulatto shall fail and neglect to pay the tax required by section second of this act, then it shall be the duty of the sheriff of the county wherein such tax payer may reside or be found, to immediately collect such tax, with the additional sum of one dollar, and mileage, which additional sum and mileage shall go to the sheriff, as his fees; the balance shall be paid into the county treasury, and the sheriff is required to make return to the county treasurer of the taxes collected under the provisions of this act, on the first Monday of June, and every three months thereafter.

SEC. 4. Should such negro, Chinaman, kanaka or mulatto, fail to pay the tax required by section second of this act, and should the sheriff be unable to collect the same, or make the same out of property belonging to such tax payers, then it is made the duty of the sheriff to arrest such negro, Chinaman, kanaka or mulatto, and put him at work on the public highways, under the direction of the road supervisor, in the district where the negro, Chinaman, kanaka or mulatto may be arrested, or found, and such taxpayers shall be required to work one day on such highways, for every half-dollar of such tax due and unpaid, and in addition thereto, shall be allowed his board, which shall be paid by the county in which such labor is performed, and the sheriff shall be allowed by the county court a reasonable sum for his service.

SEC. 5. All acts and parts of acts in conflict with this act be, and the same are hereby, repealed.

Passed the House of Representatives Oct. 8, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed Senate Oct. 13, 1862.

WISON BOWLBY,
President of the Senate.

APPROVED October 15, 1862,

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the payment of certain contingent expenses of the legislative assembly.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the sum of three hundred dollars, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the treasury not otherwise appropriated, for the payment of expenses incurred in furnishing members of this legislative assembly with newspapers: *Provided,* That no member shall be furnished with more than six newspapers.

SEC. 2. That the Secretary of state furnish the members of the legislative assembly, through the sergeant-at-arms of the two houses, with such newspapers, herein provided for, as they require, and draw his warrant for the expenses so incurred, in favor of the proper parties.

SEC. 3. Inasmuch as there is no law on this subject, and the emergency will not admit of delay, this act shall be in force from and after its approval by the governor.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED September 29, 1862.

ADDISON C. GIBBS.

An act to provide for the adjudication and payment of claims against the late territorial government of Oregon.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* that any person or persons having claims against the late territorial government of Oregon or present state government, be and the same are hereby authorized to bring action or suit against this state, in the circuit court held in the county where such claimant or claimants, or a majority of them, may reside.

SEC. 2. That the court shall hear and determine the rights of such claimants as in other cases, and be governed by the same rules and regulations as in other cases where action or suit has been brought against persons: *Provided,* However, that it shall be the duty of the district attorney of the district within which such suit may be brought to defend the state, and the right of appeal shall be allowed as in other cases: *Provided, further*, That the right of appeal shall not be allowed to the legislative assembly.

SEC. 3. That a copy of the judgment or decree of the court where such claim or claims have been allowed, properly certified to by the clerk of such court, shall be a sufficient voucher to the secretary of state to authorize him to issue a warrant to the claimant, or claimants, for the payment of the same.

SEC. 4. That the presentation of a claim now existing, to the legislative assembly, or either house thereof, whether of the territorial government or of the present state government, shall be deemed and construed to be equivalent to the commencement of an action or suit therefor, so as to prevent the same from being barred by the statute of limitations.

Passed the House of Representativrs, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act declaring the Calipooia river a public highway.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, That the main channel of the Calipooia river from its mouth to the Albany Mills, on said stream, shall be, and the same is hereby declared a public highway.

SEC. 2. To prevent obstructions being placed in said river by persons so disposed, this act shall take effect and be in force from and after its approval by the governor.

JOEL PALMER,
Speaker House Representatives.

WILSON BOWLBY,
President of the Senate.

APPROVED September 29, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide, in certain cases, for the return of votes cast for state senators.

SECTION 1. *Be it enacted by the legislative assemby of the state of Oregon,* That where two or more counties are united in the same senatorial district, the return of votes cast for senator shall be forwarded by the county clerks to the secretary of state, in like manner as votes cast for judges of the supreme court and prosecuting attorneys are now required by law to be returned.

SEC. 2. All acts and parts of acts inconsistent with this act, are hereby repealed.

Passed the Senate, October 10, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House of Representatives, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to regulate the salaries of county judges.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the county judges of the several counties of this state, shall as a compensation for their services, receive the following annual salaries: The county judge of Jackson county, $1,200; Josephine county, $500; Douglas county, $400; Umpqua county, $400; Coos county, $300; Curry county, $400; Lane county, $500; Benton county, $600; Marion county, $800; Polk county, $800; Yamhill county, $500; Washington county, $600; Multnomah county, $1,500; Wasco county, $600; Columbia county, $200; Clatsop county, $150; Tillamook county, $50; Linn county, $500; Clackamas county, $600; Baker county, $800; Umatilla county, $600.

SEC. 2. Said salaries shall be paid quarter yearly, from the 31st day of December, A. D. 1862, and said payment shall be made by the county treasurer of the proper county, upon orders drawn upon him by the county clerk, which said orders shall be properly numbered and recorded by the county clerk, as other orders are numbered and recorded.

SEC. 3. That an act regulating the salaries of county judges, approved June 4, 1859, and section one of an act regulating the salaries of county judges and county commissioners, approved October 19, 1860, be and the same are hereby repealed.

Passed the House of Representatives, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to amend an act entitled "an act relating to elections."

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That there shall be allowed out of the county treasury of each county to the several judges and clerks of elections, two dollars per diem, and to the person carrying the poll book from the place of election to the clerks office the sum of ten cents per mile for going and returning to be paid out of the county treasury.

SEC. 2. That section thirty-six of the act to which this is an amendment be and the same is hereby repealed.

Passed the House of Representatives, October 10, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 13, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the election of two commissioners for Polk, and the reduction of the salary of the county judge thereof.

SECTION 1. *Be it enacted by the legislative assembly of the State of Oregon,* That at the next general election in the county of Polk, the electors thereof may determine by vote, for or against the election of two commisioners to sit with the county judge of said county, whilst transacting county business, the returns of said vote to be made and canvassed in the same manner as provided by law for other elections, and the county clerk of said county is required, in preparing poll books for said election, to make two additional columns, one "for" and the other "against," said proposition, and also columns for the election of two commissioners.

SEC. 2. That at said election, there shall be elected two commissioners in the same manner as such officers are elected in other counties, and in case a majority of the voters of said county are in favor of the organization of said board, then the county commissioners so elected, shall be qualified and have all the authority and perform all the duties prescribed by the law regulating boards of county commissioners of other counties.

SEC. 3. That if the said board of county commissioners shall be established and organized, as provided in the preceding section of this act, the salary of the county judge of said county, from and after the time of said organization, shall be five hundred dollars per annum.

Passed the House of Representatives, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY,
President of the Senate..

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to prevent the spread of contagious or infectious diseases among domestic animals.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That no person or company of persons shall bring or cause to be brought into this state, sheep, horses, hogs, cattle or domestic animals of any description, knowing them to be affected by any contagious or infectious disease, under penalty of a fine of not less than fifty, nor more than five hundred, dollars for each diseased animal so brought, or introduced, said fine to be collected by an action brought for that purpose, before any court having competent jurisdiction in the county where such animal or animals were introduced, to be paid into the county treasury of said county for the use and benefit of common schools.

SEC. 2. Any person or company of persons, now or hereafter, having ownership of, or in, any animal or animals affected by contagious or infectious diseases, shall keep such animals within an inclosure, or in a district secure from the contact with other animals. Any person wilfully or knowingly violating the provisions of this section, shall be liable to the same fine as provided for in the first section of this act.

SEC. 3. That owing to the present exigencies of the case, this act shall take effect and be in force from and after its approval by the governor.

Passed the House of Representatives October 7, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 14, 1862.

WILSON BOWLBY.
President of the Senate.

APPROVED October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to amend an act entitled "an act to protect fair grounds."

Be it enacted by the legislative assembly of the state of Oregon, That section first of the act entitled "an act to protect fair grounds," approved October 19th, 1860, is amended to read: "That if any person shall set up any shop, booth [or] wagon, for the sale of spirituous or other liquors, cigars, provisions, or any article of traffic, or shall sell any liquors, cigars, goods, wares, merchandise, or any article of traffic whatsoever, within the bounds of any grounds selected and occupied as a place for holding any agricultural, horticultural or mechanical fair of public exhibition, or within one half mile of any such grounds, without the written permission of those having proper charge of the same; every person so offending, shall, on conviction thereof, before any court having competent jurisdiction, be fined in any sum not exceeding one hundred dollars, nor less than ten dollars: *Provided,* That this section shall not be construed to authorize the instituting of of any monopoly; but that no permit, or license, to sell the articles, as above enumerated, shall be granted to any person, that shall not be granted to any other person, upon his applying to the proper officers of such fair, or public exhibition, as aforesaid, and complying with the conditions prescribed by such officers."

Passed House of Representatives October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate October 15, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to repeal section 22 of an act entitled "an act to tax and protect Chinamen, mining in Oregon."

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That section 22 of an act to tax and protect Chinamen mining in Oregón, passed at the session of the legislative assembly of the state of Oregon, begun September 10, 1860, and approved by the governor, October 19, 1860, be and the same is hereby repealed.

SEC. 2. Inasmuch as said section 22 vitiates and nullifies all laws now in force, regulating the taxation of Chinamen in this state, this act shall be in force from and after its approval by the governor.

Passed House of Representatives, October 14, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to encourage the cultivation of oysters.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the natural oyster beds, in the waters of this state, shall be free to all citizens thereof; but artificial plantations of oysters, belonging to such citizens, if distinctly marked out, by means which shall not obstruct navigation, and not exceeding the extent allowed by local regulations, shall be protected by the law as private property.

Sec. 2. No person shall remove oysters from natural or artificial beds, except for replanting, in the waters of this state, between the fifteenth day of May and the tenth day of August, in any year.

Sec. 3. No person, not a citizen of the United States, or competent to become such, under the laws of congress, and actually domiciled within the state, and subject to state and county taxes, shall gather oysters in natural beds for sale, or transportation, or for replanting, nor shall own any artificial oyster bed, or any interest therein, nor shall any person purchase oysters for transportation, or replanting, except from persons so qualified.

Sec. 4. No person gathering oysters from natural or artificial beds, shall commit or permit waste, by casting young oysters, or shells, on shore, or in places unfavorable to their growth and increase.

Sec. 5. Every person who shall offend against any of the prohibitions of this act, shall, on conviction, be fined in any sum not exceeding five hundred dollars for every such offense.

Sec. 6. The " act for the preservation of oysters," passed December 22, 1853, is hereby repealed.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

Approved, September 27, 1862.

ADDISON C. GIBBS.

An act to regulate marriages.

Be it enacted by the legislative assembly of the state of Oregon, as follows:

Section 1. Marriage is a civil contract, which may be entered into by males of the age of eighteen years, and females of the age of fifteen years, who are otherwise capable.

Sec. 2. The following marriages are prohibited:

1. When either party thereto had a wife or husband living at the time of such marriage.

2. When the parties thereto are nearer of kin to each other than

first cousins, whether of the whole or the half blood, computing by the rules of the civil law.

3. When either of the parties is a white person and the other a negro or a person of one fourth or more negro blood.

SEC. 3. When either party to a marriage shall be incapable of consenting thereto, for want of legal age or sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed.

SEC. 4. Marriages may be solemnized by any minister or priest of any church or congregation in the state, anywhere within the state, and by any judicial officer of the state, anywhere within his jurisdiction.

SEC. 5. In the solemnization of a marriage, no particular form is required, except that the parties thereto, shall assent or declare in the presence of the minister, priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife.

SEC. 6. The person solemnizing a marriage shall give to each of the parties thereto, if required, a certificate thereof, specifying therein the names and residence of the parties, and of at least two witnesses present, the time and place of such marriage, and the date of the license therefor and by whom issued.

SEC. 7. A person solemnizing a marriage shall, within one month thereafter make and deliver to the county clerk of the county where the marriage took place, a certificate containing the particulars specified in the last section; such certificate may be in the following form:

STATE OF OREGON, } ss
COUNTY OF ——— }

This is to certify that the undersigned, (minister, priest, or judicial officer, as the case may be,) by authority of a license bearing date the —— of —— A. D. 18—, and issued by the county clerk of the county of ——, did on the —— day of —— A. D. 18—, at the house of —— ——, in the county and state aforesaid, join in lawful wedlock, A. B., of the county of ——, and state of ——, and C. D., of the county of ——, and state of ——, with their mutual assent, in the presence of E. F. and G. H., witnesses.

Witness my hand, J. P., judge, justice of the peace, minister or priest, as the case may be.

SEC. 8. The county clerk shall file such certificate, and record the same in the record of marriages, and the legal fees therefor shall be paid by the person solemnizing the marriage, who shall be entitled to demand and receive the same from the parties before the marriage.

SEC. 9. Any person solemnizing a marriage, who shall wilfully refuse or neglect to make and deliver to the county clerk for record the certificate mentioned in the last section within the time in such section specified, shall forfeit for such refusal or neglect a penalty of not less than ten, nor more than fifty dollars, to be recovered by action, for every five days of such neglect or refusal.

SEC. 10. A marriage solemnized before any person professing to be a minister, or priest of any church or congregation of this state, or any judicial officer thereof, is not void, nor shall the validity thereof be in any way affected, on account of any want of power or authority in such person, if such person was acting at the time in the office or the capacity of a person authorized to solemnize marriage, and if such marriage be consummated with a belief on the part of the persons so married or either of them, that they have been lawfully joined in marriage.

SEC. 11. Illegitimate children, become legitimate by the subsequent marriage of their parents with each other; and all marriages, to which there are no legal impediments, solemnized before or in any religious organization or congregation according to the established ritual or form commonly practiced therein are valid; but in such case a certificate thereof, containing the particulars specified in section 6, shall be made and filed for record by the person or persons presiding or officiating in such religious organization or congregation, in like manner and with like effect as in ordinary cases.

SEC. 12. Before any persons can be joined in marriage, they shall produce a license from the county clerk of the county in which the female resides, directed to any person or religious organization or congregation authorized by this act to solemnize marriage, and authorizing such person, organization or congregation to join together the persons therein named as husband and wife.

SEC. 13. Such license shall not issue, without the written consent of the parent or guardian, if there be any, if the female be within the age of eighteen years, or the male within the age of twenty-one years, nor in any case unless the parties are each of an age capable of contracting marriage; but if either of the parties have no parent or guardian, resident within this state, and the female has resided within the county where the license is applied for, for the period of six months next preceding such application, the license may issue, if otherwise proper, without the consent mentioned in this section.

SEC. 14. Before the license issues, the applicant therefor, shall file with the clerk an affidavit of some person other than the parties seeking the license, shewing the facts specified in the last section, or any of them that may be necessary to be shewn in the particular case, except the consent of the parent or guardian, and such affidavit shall be sufficient authority to the clerk, so far as such facts are concerned for issuing the license.

SEC. 15. The person solemnizing the marriage is authorized to retain in his possession the license; but the clerk who issues the same, before delivering it, shall enter in the marriage book, a memorandum of the names of the parties, the consent of the parent or guardian if any, and the name of the affiant and the substance of the affidavit, upon which the license issued, and the date of such license.

SEC. 16. Any clerk who shall issue a license contrary to the provisions of this act, shall, upon conviction thereof, be punished by imprisonment in the penitentiary or county jail not more than one year, or by a fine of not more than five hundred nor less than one hundred dollars.

SEC. 17. Any person who shall undertake to join others in marriage, knowing that he is not lawfully authorized so to do, or any person authorized to solemnize marriage, who shall join persons in marriage contrary to the provisions of this act, shall, upon conviction thereof, be punished by imprisonment in the penitentiary or the county jail not more than one year, or by a fine of not more than five hundred nor less than one hundred dollars.

Passed House of Representatives, October 7, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed Senate, October 10, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to increase the revenue of the state.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the annual tax hereafter to be levied in this state, to defray the current expenses of the state, shall be three mills on the dollar of all taxable property, and in addition thereto, a poll tax of one dollar shall be assessed on and paid by each and every male person over twenty-one and under fifty years of age.

SEC. 2. The act entitled "an act to increase the revenue of the state," approved June 3d, 1859, is hereby repealed.

Passed the House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to create a fifth judicial district, and increase the number of justices of the supreme court.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That to provide for the emergency created by the rapid settlement of the state east of the Cascade mountains, the number of justices of the supreme court is hereby increased to five.

SEC. 2. The county of Wasco, together with all the counties and territory east of the summit of the Cascade mountains, are hereby erected into a separate judicial district, to be called the fifth district.

SEC. 3. At the first general election after the passage of this act, a justice of the supreme court shall be elected by the qualified electors of the said district, to serve for the term of six years, and until the commencement of such full term, the said vacant office shall be filled by appointment of the governor.

SEC. 4. The said judicial district shall also constitute a separate district for the election of a prosecuting attorney, and until the next general election, the said office shall be filled by the prosecuting attorney of Wasco county.

Sec. 5. To prevent delay in the administration of justice, this act shall take effect and be in force from the time of its approval by the governor.

Passed the House of Representatives September 29, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed Senate October 7, 1862.

WILSON BOWLBY,
President of the Senate.

Approved October 11, 1862,

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the sale and disposition of the land donated to the territory of Oregon for the "establishment and endowment of a university," and known as the Oregon City Claim.

Section 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the donation of land known as the Oregon City claim, to the territory of Oregon, as per section eleven of an act of congress creating the office of surveyor general of the public lands in Oregon, &c., approved September 27th, 1850, be and the same is hereby accepted by the state of Oregon, under the provisions and restrictions of said section eleven of said act.

Sec. 2. All the right, title and interest of the state of Oregon in and to the Oregon City claim, is hereby conveyed and confirmed to the legatees of the late Dr. John McLoughlin, upon the express condition that the said legatees or assigns shall pay into the university fund the sum of one thousand dollars and interest thereon from the time this act shall take effect at the rate of ten per cent. per annum.

Passed House of Representatives, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed Senate, October 11, 1862.

WILSON BOWLBY,
President of the Senate.

Approved, October 11, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to organize Umatilla county.

SECTION 1. *Be it enacted by the legislative Assembly of the state of Oregon,* That all that portion of Wasco county, beginning in the middle of the channel of the Columbia river opposite the mouth of Willow Creek, thence up the middle of the channel of said river to the point where the 46th parallel of latitude crosses said river; thence east along said parallel to the summit of the Blue mountains; thence southwest along the summit of said mountain to the divide between the middle and south fork of John Day's river; thence northwest along said divide to its intersection with the south fork of John Day's river; thence down the channel of said river to its junction with the north fork of said river; and from thence northerly along the ridge dividing the waters of John Day's and Willow creek to the place of beginning, be and the same is hereby created and organized into a separate county by the name of Umatilla county.

SEC. 2. That all within the said boundaries shall compose a county for all civil or military purposes, and shall be subject to the same laws, rules, regulations and restrictions as all other counties, and entitled to elect the same officers as other counties of this state.

SEC. 3. The county seat of Umatilla county shall be temporarily located at or near the Umatilla river, opposite the mouth of the Houtama or McKay creek, at what is known as Marshall's Station, until the same shall be removed by the citizens of said county as provided by law.

SEC. 4. Until the next general election the following named officers are hereby appointed to discharge the duties of their respective offices as prescribed by law, viz: county judge, Richard Combs; county clerk, H. H. Hill; county commissioners, Thomas McCoy, John R. Courtney; sheriff, Alfred Marshall.

SEC. 5. The county court is hereby authorized to appoint all county and precinct officers not hereinbefore provided, and to fill all vacancies until the next general election.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED September 27, 1862.

ADDISON C. GIBBS.

An act to fix the time and place for holding the supreme court

Section 1. *Be it enacted by the legislative assembly of the State of Oregon,* That a term of the supreme court shall be held at the seat of government on the first Monday in September, annually.

Sec. 2. That so much of the act entitled "an act to fix the times and places of holding the terms of the supreme and circuit courts," passed by the legislative assembly of Oregon, June 2d, 1859, as relates to the supreme court, is hereby repealed.

Sec. 3. In order to accomplish the purpose of this act, and to prevent the holding of the December term of said court, this act shall be in force from and after its approval by the governor.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

Approved, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act relating to mining claims, ditches and flumes.

Section 1. *Be it enacted by the legislative assembly of the state of Oregon,* That mining claims, ditches used for mining purposes, and mining flumes permanently affixed to the soil, be and they are hereby declared real estate, for all intents and purposes, whatever.

Sec. 2. That the laws relative to the sale and transfer of real estate and the application of the liens of mechanics and laborers thereon be and they are hereby made applicable to said mining claims, ditches and flumes.

Passed the House, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY,
President of the Senate.

Approved, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to regulate traveling on public highways and to punish violations thereof.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon, as follows:* Whenever any person driving any vehicle, shall meet, on any public highway in this state, whether owned or kept by a corporation or private person, the persons so meeting shall seasonably turn their vehicles to the right of the center of the road, so as to permit each vehicle to pass without interfering with, or interrupting the other.

SEC. 2. If any person shall wilfully violate the provisions of this act, he shall forfeit and pay the sum of five dollars for every such violation, to the party injured, to be recovered by a civil action, and such further damage in the same action as such party may directly sustain by reason of such violation.

SEC. 3. That whenever any person driving a vehicle, who shall violate the provisions of this act, is at the time in the employ of another, such other person is liable for the penalty herein provided, the same as if he were the driver of such vehicle at the time of such violation, but an election to sue either the driver or employer is a bar to an action against the other.

Passed the House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY,
President of the Senate..

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to legalize the official acts of public administrators.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That all acts and official duties heretofore performed by certain county officers known as public administrators, are hereby declared legal so far as applies to Josephine or other counties that may claim the benefit of this act, provided said official duties was in accordance with a supposed act creating the office of public administrator.

SEC. 2. Inasmuch as there are now suits at law pending wherein this act may save certain estates costs and expenses this act shall take effect and be in force from and after its approval by the governor.

Passed the Senate, October 10, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for auditing the civil debt of the provisional government,

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, as follows: That the secretary of state be and he is hereby appointed "commissioner of the provisional government civil debt."

SEC. 2. Such commissioner has power and authority to audit the claims of all persons against the late provisional government of Oregon, other than those arising out of what is commonly known as the "Cayuse war," carried on by that government in the years 1847 and 1848.

SEC. 3. Any person other than an original claimant, who presents a claim to the commissioner, shall file with such claim the evidence of his right thereto, as the assignee of such claimant, or the legal representative of such claimant, or assignee; and if the original evidence thereof has been lost or destroyed, secondary evidence thereof shall be received in its stead.

SEC. 4. Every claimant shall file with his claim all original papers or vouchers relating to the same, unless lost or destroyed, and his own affidavit to the effect that the claim is just and has never been paid or satisfied as he verily believes.

SEC. 5. Any affidavit required by this act may be taken before the commissioner, or before any officer of this state authorized to administer oaths.

SEC. 6. The commissioner shall audit and allow or disallow each claim in the order of its presentation, and report his proceedings in relation to each claim, with the evidence in relation thereto, to the legislative assembly when required by it.

SEC. 7. It is not the intention or purpose of this act to bind the state of Oregon to pay the civil debt herein referred to, or in any way to assume it, but to provide means to enable the holders thereof to prove and establish the same, so that the state of Oregon may present the same to the congress of the United States, and urge upon such congress the payment of the amount thereof, as a debt incurred by the early settlers of Oregon, in supporting a government over this country for and on behalf of the United States.

SEC. 8. The commissioner may authenticate all proceedings or affidavits had or taken before him by his signature, and such authentication is sufficient without the use of a seal.

SEC. 9. As a full compensation to the commissioner for the duties imposed or required by this act, he is entitled to receive from each claimant before receiving or filing his claim, the sum of one dollar, and the legal fees for all affidavits taken before him at the time they are so taken.

SEC. 10. When by any law of such provisional government, or any warrant, order or voucher, or other evidence of a claim, it appears that such claim was to bear interest at any particular rate, such claim shall be audited and allowed accordingly, and interest at the rate of six per cent. per annum shall be allowed on all other claims from the time it appears they should have been paid or were due.

Passed the House of Representatives October 15, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY.
President of the Senate.

APPROVED October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act amending an act entitled an act for the establishment of pilotage on the Columbia and Willamette rivers.

SECTION 1. *Be it enacted by the legislative assembly of the State of Oregon,* That section twelve of the act approved October 17, 1860, entitled an act for the establishment of a pilotage on the Columbia and Willamette river, is hereby amended so as to read as follows: Every bar pilot to whom a branch or warrant shall be granted by said board, shall, before entering upon the duties for his or their office, give bonds with sufficient security, to the said board of pilot commissioners, in the sum of five thousand dollars, and every river pilot to whom a branch or warrant shall be granted by said board, shall, before entering upon the duties for his or their office, give bonds with sufficient security, to the said board of pilot commissioners in the sum of three thousand dollars, for the faithful performance of his or their duties while in office.

SEC. 2. Inasmuch as a new board of pilot commissioners has to be elected this session of the legislature, this act is to take effect from and after its approval by the governor.

Passed House of Representatives October 10, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate October 13, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to authorize the owners of land lying upon a navigable stream or other like water to build wharves into such stream or other water, beyond the line of low water mark.

Be it enacted by the legislative assembly of the state of Oregon, as follows:

SECTION 1. The owner of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves, upon the same, and extend such wharf or wharves into such stream or other like water, beyond low water mark, so far as may be necessary and convenient, for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.

SEC. 2. The corporate authorities of the town wherein such wharf or wharves is proposed to be constructed, shall have power to regulate the exercise of the privilege or franchise herein granted, and upon the application of the person entitled to, and desiring to construct such wharf or wharves, such corporate authorities, shall by ordinance, or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low water mark, so that such wharf or wharves shall not be constructed any farther into such stream or other water beyond such low water line than may be necessary and convenient for the purpose expressed in the first section of this act, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water.

Passed the House of Representatives, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to amend "an act to provide for the payment of the expenses of the legislative assembly of the state of Oregon."

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That section first of an act entitled an act to provide for the payment of the expenses of the legislative assembly of the state of Oregon, be, and the same is hereby, amended so as to read as follows: That the secretary of state is hereby authorized and required to audit and allow, upon the certificate of the presiding officers of the senate and house of representatives respectively, attested by the chief clerks thereof, issued at any time during the session thereof, the claims of members and officers of said bodies for services rendered at the session thereof, as follows, to-wit: To the president of the senate and speaker of the house of representatives respectively, at the rate of five dollars per day, and three dollars for every twenty miles necessarily traveled, in going to, and returning from, the seat of government; to the chief clerk of the senate and house of representatives respectively, five dollars per day; to the members of each house, the sergeant-at-arms, assistant clerks, enrolling clerks and door keepers, at the rate of three dollars per day, and three dollars for every twenty miles necessarily traveled in going to, and returning from, the seat of government: *Provided,* That said chief clerks, assistant clerks, enrolling clerks, sergeant-at-arms and door keepers, shall not be entitled to receive mileage under the provisions of this act.

SEC. 2. Inasmuch as there is at present no law allowing members and officers of the legislative assembly to receive their pay, until the last day of the session, and thereby occasioning inconvenience to said members and officers, this act shall be in force from and after its approval by the governor.

Passed House of Representatives, October 7, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 8, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 11, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to amend an act entitled an act to create the county of Multnomah.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That section two of an act entitled an act to create the county of Multnomah, passed December 22d, 1854, which was as follows: The territory bounded north by Multnomah county, east and south by the Willamette river, and west by the meridian line, is hereby made part of the county of Clackamas—shall be, and the same is hereby, amended so as to read as follows: The territory bounded north by Multnomah county, east and south by the Willamette river, and west by the meridian line; and also that part of Washington county lying in section twelve (12), in township (3), south of the base line, and one (1) west of the Willamette meridian, is hereby made a part of the county of Clackamas.

Passed the House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act for the recovery of real or personal property escheated to the state, and for the disposition of estates where the heirs are unknown or disabled from claiming the same.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, as follows: When any person shall die without heirs, leaving any real or personal property in this state, the same shall escheat to, and become the property of the state.

SEC. 2. The state may maintain any action, suit or proceeding necessary to recover the possession of any such property, or for the enforcement or protection of its rights thereto, or on account thereof, in like manner, and with like effect, as a natural person: such action, suit or proceeding shall be prosecuted by the proper district attorney, by the leave and under the direction of the governor, and not otherwise.

SEC. 3. Whenever the administration of an estate has been completed, and the assets thereof are ready for distribution, and there are no known heirs entitled to the same, or if any such heirs do not, either in person or by their lawfully authorized agents, claim the same within six months thereafter, the administrator of such estate shall, under the direction of the county court, as in case of ordinary sales of property by an administrator, sell the same and pay the net proceeds thereof into the treasury of the state.

SEC. 4. The treasurer shall give such administrator duplicate receipts for the amount so paid, specifying therein the name of the deceased person, of whose estate it is the proceeds, one of which receipts such administrator shall file with the secretary of state, as a voucher against such treasurer, and the other with the clerk of the county court where the administration was conducted, and such payment and the filing of such receipts as herein directed, shall be a complete and full discharge of such administrator, on account of such proceeds.

SEC. 5. The treasurer shall enter such sums so paid in a book to be kept for that purpose, specifying in such entry the name of the deceased person, of whose estate it is the proceeds, and at any time within fifteen years thereafter, the heirs of such deceased person, if any, shall be entitled to claim and receive such proceeds with interest at the rate of six per cent. per annum thereon from the state.

SEC. 6. Whenever any real or personal property escheats to the state as provided in the first section of this act, as soon thereafter as the state shall recover possession of the same, or if the same be not in the possession of any one, then as soon thereafter as may be deemed expedient, the governor shall direct the proper district attorney to have the same sold and pay the net proceeds into the treasury of the state.

SEC. 7. Upon receiving such order from the governor the district attorney shall indorse upon the back of the same a direction to the sheriff of the county where such property is situate or may be found, to sell the same; and all such sales shall be made by the sheriff as upon execution, unless otherwise specially directed by such order; and the sheriff shall pay the net proceeds of such sale to the district attorney from whom he received the order of sale or his successor in office, who shall pay the same into the state treasury, as in case of other moneys collected by him in his official capacity.

SEC. 8. In an important case the governor is authorized and it is his duty to employ counsel to assist the district attorney in any action, suit or proceeding, directed by him concerning property alleged to have been escheated to the state, as provided in this act, upon such terms as may be just and reasonable.

Passed the Senate, October 14, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House of Representatives, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to regulate the rights of miners and farmers in the mining districts.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That any person, or persons, making discoveries of gold on fields, ranches or pastures in the mining districts of this state, shall have the privilege to work in the mines so discovered, and shall have the right of way for sluices, tail sluices and ditches necessary to work such claims: *Provided,* That such fields or premises have not been patented by the government of the United States, or when the claimant of the land has not complied with the requirements of law so as to vest the title but left for mining purposes according to act of congress passed September 27, 1850: *Provided, further,* That a fair value be paid for the purchase, or as damages, to the possessor or owner of such premises, or for such part as may be needed to work such mining claim.

SEC. 2. Any person, or persons, owning a mining claim or claims on or near farms, ranches or pastures, shall have right of way for ditches and sluices through such premises with payment therefor, as provided in section first: *Provided*, That such ditches and sluices, or reservoirs, shall not be near houses or fixed improvements, causing danger to the same or persons therein, or danger to fences.

SEC. 3. In assessing the value of any premises, whether for purchase or damages, as mentioned in section first, when no agreement can be had between the parties, they shall each choose some disinterested person as arbitrator, and they not agreeing, shall choose another person as umpire, whose decision shall be final as to the value in such case: *Provided*, That the decision of such arbitrators may be vacated on motion in the circuit court as in other cases provided by law.

SEC. 4. When the value of property or damages as ascertained, as mentioned in section third, the amount awarded shall be tendered to the owner or possessor of such premises, who shall take the same and give peaceable possession.

SEC. 5. In case possession is not given on tender being made of the amount awarded, the party claiming ground for mining purposes, or ditch, or sluice privileges, shall be placed in possession, by the sheriff of the county, without further notice or process of law. He, or they, the party claimant, paying into the hands of the sheriff, the amount awarded, as provided in section third, who shall pay the same forthwith, to the owner in part, or late proprietor of such premises, or to the county clerks, subject to the order of such person at sight, less the clerk's fees and charges, sheriff's costs, &c. But if such money be not called for at the end of twelve months, it shall be turned over into the county fund and belong to the county.

SEC. 6. No person shall prospect on the fields of farms outside of the mining districts without first giving security to the owner or occupant thereof, or a tender of award as provided in section third and fourth, for purchase of the whole or a part of such premises, or for damages thereof.

SEC. 7. No person shall prospect on the public roads, or streets, without first tendering ample security, to the county or town authorities, against accidents to persons or damages to the public travel.

SEC. 8. Any person convicted for violating sections sixth and seventh sections of this act may be fined from one to fifty dollars and costs.

SEC. 9. Persons acquiring mining claims under the provisions of this act, who desert the same for one month, when the water is not deficient, nor in excess, but sufficient to work such claims, or if such claims be deserted six consecutive months, from any cause whatever, in either case all ownership shall be forfeited, and such ownership shall revert to the proprietor of the farm, ranch, or pasture on which such claim is situate, and such mining claim shall not be subject to occupation, as mentioned in section first, thereafter.

SEC. 10. Persons not eligible to citizenship in this state, shall not be allowed the benefit of this act.

SEC. 11. Arbitrators' fees under this act mentioned, shall be three dollars per day with twenty cents mileage, which shall be paid by the claimant party in advance if demanded.

The sheriff's fees shall be five dollars per day and legal mileage.

SEC. 12. All acts contravening this act are hereby repealed.

SEC. 13. To accord with the act of congress of September 27th, 1850, and to develope the resources of the state, this act shall take effect from and after its passage,

Passed the House of Representatives, September 30, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 14, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act relating to assessors.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That on or before the third Monday of June, immediately following each general election, the assessors shall each, before entering on the discharge of the duties of his office, give a bond to the county for which he was elected, in a sum of not less than three thousand dollars, with three or more good and sufficient sureties, to be approved by the judge of such county, in vacation or term time, conditioned for the faithful performance of his duties according to law; and shall take and subscribe an oath faithfully and impartially to discharge the duties of his office, according to law, and to the best of his abilities.

Sec. 2. The assessors shall immediately after qualifying, as above prescribed, receive from the county clerk a blank assessment roll for their respective counties, and proceed to assess all the taxable property within their respective counties in manner as prescribed by existing statutes.

Sec. 3. It shall be the duty of the assessors in their respective counties, and they are hereby authorized, to collect the poll tax due from each person liable to pay such tax, at the time of assessing his property: *Provided*, Such person is not an owner of real estate in this state, or of personal property to the amount of five hundred dollars. But if any person shall refuse to pay his poll tax when demanded by the assessor, as herein provided, the assessor shall, as soon thereafter as convenient, report such persons so refusing to pay their poll tax to the sheriff of his county, who shall immediately proceed to collect the same, as provided by law in the case of delinquent tax payers: *Provided, further*, That the officers collecting poll tax under the provisions of this act, shall give a receipt to each person for the payment of such taxes at the time he receives the same.

Sec. 4. It shall be the duty of the assessor to deduct the amount of indebtedness within this state, of any person assessed, from the amount of his or her taxable property, given under oath. Section two of an act passed January 24th, 1856, for the assessment and collection of taxes, is hereby repealed.

Passed House of Representatives October 14, 1862,

JOEL PALMER,
Speaker House Representatives.

Passed the Senate October 15, 1862,

WILSON BOWLBY,
President of the Senate.

Approved, October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act requiring the oath of allegiance in certain cases.

SECTION 1. *Be it enacted by the legislative assembly of the State of Oregon,* That in all cases where money is or has been appropriated out of the public treasury, the secretary of state shall not draw his warrant in favor of the claimant or person for whose benefit such appropriation is made, unless such claimant shall first take and subscribe before an officer having authority to administer the same, an oath or affirmation substantially as follows, viz: I, A. B., do solemnly swear, (or affirm,) that I will support, protect and defend the constitution and government of the United States, against all enemies, whether foreign or domestic, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of any state convention or legislature to the contrary, notwithstanding, and further, that I do this with a full determination, pledge and purpose, without any mental reservation or evasion whatsoever; and further, that I will well and faithfully perform all the duties which may be required of me by law, so help me God.

SEC. 2. That whenever any person has a claim against the funds of any of the counties of this state, or the common school fund thereof, before such claim shall be ordered paid by the proper authority having control of said fund or funds, to the person claiming the same, he shall take and subscribe the oath or affirmation required by section one of this act, in case of claims against the state treasury.

SEC. 3. That whenever a person shall bring a suit as plaintiff in any civil case, in any of the courts of this state, he shall, if required on motion of the defendant, based on affidavit to the effect that the plaintiff is reputed among his neighbors, and that the affiant believes him to be disloyal, made at any time before judgment, take and subscribe the oath prescribed in the section one of this act, and if he refuse to do so, the action shall be stayed until the requirement is complied with: *Provided,* That if the plaintiff be a non-resident of this state, or it appear he is a resident of a state not in rebellion against the government of the United States, the above required may be dispensed with.

SEC. 4. That whenever at any general or special election in this state, any person offering to vote at such election is challenged for disloyalty by any voter having authority to make a challenge, such vote shall be rejected unless he first take the oath prescribed by the first section of this act and in such case the oath shall be orally administered by one of the judges of election, as in the other cases of challenge.

Sec. 5. The oath prescribed by this act shall not be required by persons not citizens of the United States, nor of any sworn public officer of this state, or of the United States, nor before the same tribunal or authority more than once.

Sec. 6. Inasmuch as there is now a fierce rebellion against the government of the United States in progress, and there is no law to prevent disloyal persons from drawing moneys from the state and county treasuries, and exercising the rights of loyal citizens, this act shall be in force from and after its passage.

Passed the House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate.

WILSON BOWLBY,
President of the Senate.

Approved, October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the location of the public lands donated to the state of Oregon.

Whereas, The congress of the United States has passed acts donating to the state of Oregon lands, as follows, to-wit:

1. Seventy-two sections for the use and support of a state university, to be selected by the governor.

2. Ten entire sections to be selected in the same way, for public buildings.

3. All salt springs not exceeding twelve in number, with six sections of land adjoining each, to be selected by the governor.

4. Five hundred thousand acres of land granted under the provisions of the act of congress of September 4, 1841.

5. Ninety thousand acres of land donated by act of congress for agricultural colleges.

6. All swamp lands donated by act of March 12, 1860, and reported as such by the commissioners of the general land office. Therefore,

Section 1. *Be it enacted by the legislative assembly of the state of Ore-*

gon, That the governor of this state is hereby appointed land commissioner for the state of Oregon, and empowered and directed to locate all the lands to which this state is entitled under the foregoing provisions, and shall be allowed all necessary expenses incurred by him in performing the duties prescribed by this act.

SEC. 2. It shall be the duty of the governor of this state to prepare accurate lists of the lands by him selected, in triplicate, in the manner prescribed by the laws of the United States and the instructions of the commissioners of the general land office, one copy of which he shall forward to the commissioners of the general land office, one copy he shall forward to the register of the land office in the district in which any lands are selected; the other shall be deposited with the secretary of state. In making such selection the land commissioner shall designate for what purpose the land selected shall be applied.

SEC. 3. The secretary of state shall record all lists furnished to him by the governor, as required by section second of this act, in a book to be kept by him for that purpose.

SEC. 4. The governor is hereby authorized temporarily to employ a person having a knowledge of the country where such lands are proposed to be located, to assist in performing the duties required by this act. And the secretary of state shall draw warrants on the state treasurer, upon the certificate of the governor, at a rate not exceeding five dollars per day, in favor of the persons so employed.

SEC. 5. In cases where lands have been located under the provisions of "an act to provide for the possessory and pre-emptory rights of 500,000 acres of land donated to the state," approved October 19, 1860, in less quantity than three hundred and twenty acres, it shall be the duty of the governor to select enough public land adjoining, if such there be subject to entry, as shall make three hundred and twenty acres or as near that amount as possible for each claim so located. And in cases where such additional locations cannot be made so as to include three hundred and twenty acres of land for each location so made, the state shall receive each of said locations as if three hundred and twenty acres of land had been originally located, and account to the commissioner of the general land office for the same, in accordance with the laws of congress and the instructions of the commissioner of the general land office.

SEC. 6. All persons who have located lands under the provisions of the act of this state, which was approved October 19, 1860, shall pay to the state one dollar and twenty-five cents per acre for the lands so selected.

SEC. 7. An act entitled "an act to provide for the possessory and pre-emptory rights of 500,000 acres of land donated to the state, approved October 19, 1860." Also, "an act to provide for the location of the public lands donated to the state of Oregon," which passed ——— 1860, are hereby repealed.

SEC. 8. As it is expedient that immediate provision should be made for selecting the lands to which this state is entitled, this act shall take effect and be in force from and after its passage.

Passed the House of Representatives, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 10, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for inspecting salmon, and for the appointment of an inspector.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That all salmon put up in barrels, half barrels, quarter barrels or kits, to be sold, or exported, shall be inspected and branded, as provided in the provisions of this act.

SEC. 2. The county court of each county in which salmon is put up for market, or export, shall appoint an inspector of salmon, regulate his fees, to be collected from the person or persons selling or exporting such salmon; and may make such other regulations as may appear to them necessary for carrying out the provisions of this act.

SEC. 3. The inspector shall give bonds with sufficient sureties to the county judge in the sum of five hundred dollars.

SEC. 4. It shall be the duty of the inspector to inspect all salmon put up as specified in section one of this act, and the said inspector shall provide himself with a brand or brands, and shall brand, in plain legible letters, on the head of each cask of salmon inspected by him, the initials of his christian name, and the whole of his surname, and the year in which the salmon were packed, designating the county in which said salmon are inspected, and also whether the same are spring or fall salmon, and whether they be a prime or bad article. The said inspector shall use said brand, or brands, in marking said packages of salmon; such of said packages as may be marked bad shall be considered as condemned.

SEC. 5. All persons who shall sell or export such packages of salmon before the same are inspected and branded, shall, upon conviction thereof, be fined at the rate of ten dollars for each such barrel, and five dollars for each such half barrel, quarter barrel, or kit, so sold or exported; and every person who shall be found guilty of a repitition of the offense, shall be fined in double the sum fixed in this section as a penalty, such fine or penalty may be recovered on the complaint of any person or persons or of the inspector of salmon, before any justice of the peace, or any court of record, as in other cases provided. And all the monies arising from the fines, under this act, shall be paid over to the county treasurer, for the use and benefit of the common schools within said county.

SEC. 6. Every person who shall make or use counterfeit of the brands, as provided for in section four of this act, for each time they use the same in branding said packages of salmon, shall, upon conviction thereof, be imprisoned in the penitentiary for a term not exceeding one year for each offense.

Passed the House of Representatives October 14, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed Senate October 14, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 17, 1862,

ADDISON C. GIBBS,
Governor of Oregon.

An act for the support of the government, and to pay the sum apportioned to be paid by this state of the direct tax levied by the act of congress, approved the fifth day of August, eighteen hundred and sixty-one.

SECTION 1. *Be it enacted by the legislative Assembly of the state of Oregon,* That the sum of thirty-five thousand one hundred and forty and two-thirds dollars be, and the same is hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the payment to the government of the United States, of the amount apportioned to be paid by this state, of the direct tax levied by the act of congress, approved the fifth day of August, eighteen hundred and sixty-one.

SEC. 2. That the sum of ten thousand dollars of said amount be paid by the state treasurer whenever the proper officer of the treasury department of the United States shall draw upon this state therefor, and the sum of twenty-five thousand one hundred and forty and two-thirds dollars, shall be paid likewise, upon like draft, drawn at any time after the first day of March, next, and the treasurer of state shall pay the amount hereby appropriated in coin.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED, October 20, 1862.

ADDISON C. GIBBS.

An act to amend an act entitled an act for fixing the commencement and close of the terms of state and county officers, approved October 17th, 1860.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That section four of said act be amended to read as follows, "the term of office of all county officers, excepting county assessors, shall end on the first Monday of July next following the general election, at which time the term of those elected to fill said office shall commence, and the term of office of county assessor shall end on the third Monday of June next following the general election, at which time the term of succesors to their office shall commence."

SEC. 2. That all acts or parts of acts in conflict with this act are hereby repealed.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED September 29, 1862.

ADDISON C. GIBBS.

An act to provide for the location of the agricultural college.

Whereas, The congress of the United States has donated to the state of Oregon ninety thousand acres of land for the endowment of an agricultural college to be located in said state, therefore

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, That Hons. A. C. Gibbs, B. J. Pengra, L. T. Woodward, R. P. Boise and Jesse Applegate are hereby appointed commissioners to locate said college, and they are hereby empowered and directed to locate the same as hereinafter provided.

SEC. 2. The said commissioners, or a majority of them, shall meet at Corvallis within the six months next ensuing, after giving due notice in some paper having general circulation in this state, to receive such proposals of gifts or donations of lands, buildings, or other property, from any party or parties desiring to offer proposals for the location of such college, and when said proposals are opened and duly considered, the said commissioners shall locate said college at such place as a majority of them may decide: *Provided*, no proposal shall be entertained unless accompanied with satisfactory guarantees that said proposals will be duly executed if it shall be adopted.

SEC. 3. Inasmuch as the location of said institution is necessary at an early day, therefore this act shall take effect from and after its approval by the governor.

Passed Senate, October 13, 1862.

WILSON BOWLBY,
President of the Senate.

Passed House of Representatives, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act for the recovery of property removed by high water.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, That when the fence rails, or other property, of any person or persons in this state shall be removed by high waters and lodged upon the lands of another, it shall be lawful for the owner or the owners thereof to proceed, as soon as convenient, or within four months thereafter, upon the premises where such property may be lodged, and in case the proprietor of said land shall refuse to deliver up the same, the parties shall each select an arbitrator who shall examine or hear evidence upon all the circumstances and facts, and determine the case: *Provided*, That if they cannot agree, they shall select an umpire, and the decision of a majority of them shall be final between the parties.

SEC. 2. That before said arbitrators shall proceed, as above provided, they shall be sworn to discharge their duties faithfully, impartially and according to law, by some person having power to administer oaths.

SEC. 3. That when five or more persons shall claim any property, as aforesaid, they shall give notice to all interested, of the time and place of such arbitration, and upon hearing all the facts and circumstances in the case, the arbitrators shall award to each such a proportion of said property, as they may deem reasonable and just.

SEC. 4. That it shall not be considered a trespass, for any person to go upon the lands of another for the purposes in this act mentioned: *Provided*, That such person shall go upon such route as will do the least possible injury to said lands if it be practicable.

Passed the Senate, October 15, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House of Representatives, October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to change the judicial districts of the state of Oregon.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon*, That on and after the first Monday in July, 1863, the county of Douglas, heretofore belonging to the first judicial district, shall be attached and become a part of the second judicial district.

SEC. 2. That the county of Washington, heretofore belonging to the third judicial district, is hereby attached and made a part of the fourth judicial district.

SEC. 3. Suits now pending in the circuit court of Washington county, and suits pending on the first Monday in July, 1863, in the circuit court of Douglas county shall not be affected by the change of district.

Passed Senate, October 14, 1862.

WILSON BOWLBY,
President of the Senate.

Passed House of Representatives, October 15, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to organize Baker county.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That all that portion of Wasco county, commencing at a point where the 46th parallel of latitude crosses the summit of the Blue mountains; thence east, along said line to its intersection with Snake river; thence up the middle of the channel of said river, to the mouth of the Owyhee river; thence south, to the 42d parallel of latitude; thence west, along said line, to its intersection with the 118th parallel of west longitude; thence north, along said line to the summit of the Blue mountains; thence along the summit of said mountains, between the waters of Burnt and Powder rivers, and the waters of John Day's river, to the place of beginning, be, and the same is hereby, created and organized into a separate county, by the name of Baker county.

SEC. 2. That all within the said boundaries shall compose a county for all civil and military purposes, and shall be entitled to the same rights and privileges, and subject to the same laws, rules, regulations and restrictions, as all other counties of this State.

SEC. 3. That until the next general election, the following named persons are appointed to the offices herein named, to-wit: county judge, John Q. Wilson; county clerk, S. A. Clarke; sheriff, Alexander Gray; county commissioners, F. M. Spears and Martin Monahan: *Provided, however,* That the county court shall have power to fill all vacancies in county and precinct officers.

SEC. 4. That the county seat of said county shall be temporarily located at the the town of Auburn; but the citizens of said county may hereafter permanently locate the same as the law directs.

SEC. 5. To protect the rights of citizens, and to insure the administration of the laws, this act shall take effect and be in force from and after its approval by the governor.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED, September 22, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for building bridges.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That an act entitled an act to provide for building bridges, passed January 10, 1857, and an act entitled an act to amend an act entitled an act to provide for building bridges, passed house January 15, 1858, and council January 12, 1858, be, and the same are hereby, repealed.

SEC. 2. That the county court of the several counties in this state, be, and they are hereby, authorized to apply, in their discretion, any moneys in the county treasury, not otherwise appropriated, toward defraying the expenses of the building, or repairing bridges, on any of the county or state roads, within their respective counties.

SEC. 3. The county court may appoint some suitable person to superintend the letting and building, repairing and receiving the bridge, when done. When a bridge is to be built, said superintendent shall put up three notices in the county, at least twenty days prior to the time of letting such bridge, one of which shall be posted in the neighborhood where the bridge is to be built, or repaired, which notice shall state the general place of said bridge, and statement of the proposed repairs; also the time and place of letting the same; which shall be let to the lowest responsible bidder, at public outcry, and when said bridge is completed, the superintendent shall give the undertaker a certificate for the same, if in his judgment the bridge has been built or repaired according to contract, and make due report thereof to the county court, which certificate shall be a voucher to the court to pay the money: *Provided, however,* That whenever, in the discretion of the county judge, an emergency may require it, he may authorize repairs without such notice.

SEC. 5. Whenever it shall be deemed necessary by the county court of any county in this state to erect or repair a bridge over any stream which is a boundary line between two counties the county courts of said adjoining counties are hereby authorized to unite for the purpose of erecting or repairing such bridge, and when any person or persons interested shall apply in writing to the county court of either of the counties interested, the court shall proceed to appoint three viewers, who shall, after being first sworn to well and faithfully perform their duties as such viewers, proceed to view the bridge proposed to be repaired, or the site designated for such new bridge, and make an estimate of the cost of such repairs or erection, and of their proceedings, make due report to the court, together with a plan and specifications of such new bridge, or a statement of the proposed repairs. If the court shall decide to appropriate the amount necessary for its erection, or repairs, they shall submit such estimate of cost together with the plan of such bridge, or statement of repairs to the county court of the other county interested, and if said county court shall approve the same and agree to defray one half of the whole sum estimated or appropriated, together with the one half of the necessary cost of view, then the county court to which application was first made, shall proceed to appoint a superintendent, and build said bridge or make said repairs, as provided in section three of this act. The one half the whole costs and expenses of which shall be a legal claim against, and be paid by said adjoining county.

SEC. 6. Inasmuch as there are now a number of bridges in this state requiring immediate attention to secure the safety and convenience of the traveling public, this act shall have effect and be in force from and after its approval by the governor.

SEC. 7. All acts and parts of acts in conflict with the provisions of this act, be, and the same are hereby repealed.

Passed House of Representatives, October 7, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 11, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to amend an act entitled an act to regulate the treasury department.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That section six of subdivision three of said act, be amended to read as follows: "The fiscal year of this state shall commence on the" first "Monday of September in each year, and close on the day preceding said" first "Monday, and all accounts of the secretary of state and state treasurer, shall be kept, and all duties of those offices shall be performed with reference to the beginning and ending of the fiscal year."

Passed the House of Representatives, September 15, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY,
President of the Senate.

APPROVED October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to regulate the rate of interest on money, and to prevent and punish usury.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That the rate of interest in this state shall be ten per cent. per annum, and no more, on all moneys after the same becomes due, on judgments and decrees, for the payment of money, on money received to the use of another, and retained beyond a reasonable time, without the owners consent, expressed, or implied; or on money due upon the settlement of matured accounts, from the day the balance is ascertained; on money due, or to become due, where there is a contract to pay interest, and no rate specified. But on contracts, interest, at the rate of one per cent. per month may be charged, by express agreement of the parties, and no more.

SEC. 2. No person shall, directly, or indirectly, receive, in money, goods, or things in action, or in any other manner, any greater sum, or value for the loan, or use of money, or upon contract, founded upon any bargain, sale, or loan of wares, merchandise, goods, chattels, lands, and tenements, than in this act prescribed.

SEC. 3. If it shall be ascertained, in any suit brought on any contract, that a rate of interest has been contracted for greater than is authorized by this act, either directly or indirectly, in money, property, or other valuable thing, or that any gift, or donation of money, property, or other valuable thing, has been made, or promised to be made, to a lender or creditor, or to any person for him directly, or indirectly, either by the borrower, or debtor, or any person for him, the design of which is to obtain for money so loaned, or for debts due, or to become due, a rate of interest greater than that specified by the provisions of this act, the same shall be deemed usurious, and shall work a forfeiture of the entire debt, so contracted, to the school fund of the county where such suit is brought. The court in which such suit is prosecuted shall render judgment for the amount of the original sum loaned, or the debt contracted without interest, against the defendant, and in favor of the state of Oregon, for the use of the common school fund of said county, and against the plaintiff for costs of suit, whether such suit be contested or not.

Sec. 4. Nothing in this act shall be construed to prevent the proper bona fide assignee of any usurious contract recovering against his immediate assignor, or the original usurer, the full amount paid by him for such contract, but the same may be recovered by proper action, in any court having competent jurisdiction: *Provided*, Such assignee had no notice of the usury affecting the contract.

Sec. 5. Judgments and decrees for money upon contracts bearing more than ten per cent. interest, and not exceeding twelve per cent. per annum, shall bear the same interest borne by such contract.

Sec. 6. This act shall not be construed, so as to affect or change the rate of interest to be received by virtue of any contract entered into before this act shall take effect.

Sec. 7. That an act entitled an act to regulate the interest of money, passed January 26, 1854, be and the same is hereby repealed.

Passed the House of Representatives, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

Passed the Senate, October 15, 1862.

WILSON BOWLBY,
President of the Senate.

Approved, October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act providing for the working of public roads and highways.

Sec. 1. County court has authority to lease public roads.
2. Order to lease road.
3. Bid to be accompanied by undertaking.
4. Execution of lease, undertaking for performance.
5. Qualification and justification of sureties.
6. Construction of road.
7. Gates, where kept and how located.
8. Illegal tolls and refusing to pay tolls.
9. Road to be common highway.
10. Lease may be canceled or declared forfeited.
11. Upon what items of persons or property tolls are chargeable.
12. How tolls rated.
13. Order to lease road shall contain.
14. To whom lease awarded and when county court may refuse all bids.

Be it enacted by the legislative assembly of the state of Oregon:

Section. 1. Whenever a public road in any county in this state is or may hereafter be so located that there is little or no local labor along the line of said road, the county court of the county where such road or any portion of the same is, or may hereafter be located, is authorized to lease such road, or any portion of the same to any person or corporation, to open, improve and keep the same in repair for a period not exceeding ten years, with the right in consideration thereof, to collect and receive tolls for travel thereon, in the manner provided in this act.

Sec. 2. Whenever it becomes expedient and lawful under the provisions of this act, to lease a public road, or any specified section thereof, the county court shall make an order to that effect, specifying therein the termini thereof, and directing the county clerk to cause the same to be published in some weekly newspaper of general circulation therein, for a period not less than four weeks, and in like manner to give notice therewith that sealed bids will be received at such clerk's office for the leasing of such road, until a particular hour of a certain day thereafter, not more than ten days after the expiration of the publication of such order and notice.

Sec. 3. No bid shall be considered unless accompanied by an undertaking executed by two or more sureties, in the sum of two thousand dollars, to be void upon the condition that the bidder, if the lease is awarded to him, will, within ten days thereafter, enter into the contract for keeping the road, and give the undertaking to secure the performance thereof as hereinafter provided.

Sec. 4. The contract for the lease shall be subscribed by the lessee, and approved by the county judge and filed with the county clerk.

At the time of filing the contract, the lessee shall give an undertaking to the county, in a sum to be fixed by the county court, not less than two thousand, or more than ten thousand dollars, with two or more sufficient sureties, to be void upon the condition that the lessee will faithfully perform the contract in relation to such road and comply with the provisions of this act concerning the same.

SEC. 5. The sureties in the undertaking mentioned in the last section shall have the qualification of bail upon arrest, and shall justify in like manner before the county court or the clerk thereof.

SEC. 6. A road leased under this act shall be cleared of standing timber and have a track for traveling of the same width, and be kept in the same order, and the streams or other waters on the line thereof, shall be bridged, or ferries established thereon, and shall be made of such grade, and of such materials, as the contract shall specify.

SEC. 7. No tolls shall be collected for travel on such roads, except at a gate, nor unless a sign board be posted at such gate in full view of the travel on the road, with the rates of toll plainly printed or written thereon. The lease shall specify the number of gates that may be placed on the road, to which it relates, and the location thereof, and thereafter the number of such gates shall not be increased. But the county court upon the application of the lessee, may, at any time, for good reason, authorize the lessee to change the location of such gates, or any of them.

SEC. 8. The rates of toll that the lessee may collect and receive shall be specified in the lease, and none other can be charged; and any person who shall pass through a gate upon such road without paying the toll legally charged thereat, or when traveling on such road shall go round such gate with intent to avoid the payment of such toll, shall be liable to the lessee for three times the amount of such toll; and any lessee of such road who shall by himself, his agents, or servants, collect or receive of any person illegal toll, for traveling on such road shall be liable to such person for three times the amount of such toll.

SEC. 9. A road leased as provided in this act is nevertheless to be deemed a highway within the meaning of the provisions in the act relative to roads constructed by private corporations, but no footman shall be required to pay toll for traveling on such road, nor shall any person while traveling from one portion of his farm to another, with or without any stock or vehicle, or person, in his employ, or in going to, or returning from church, a funeral or an election.

SEC. 10. The county court has authority upon the application of the lessee, to cancel, or modify the lease, upon such terms as may be equitable and just, and the proper district attorney, may maintain an action against the lessee, in the name of the county, to have such lease declared forfeited, whenever the lessee shall fail or neglect to comply with the provisions thereof, and of this act.

SEC. 11. Tolls are only chargeable by the lessee upon the following items, or classes of persons or property:

1. Sheep and hogs;
2. Horses, mules, asses or neat cattle, whether being used for draught, or led or driven loose;
3. A person other than a footman, and not traveling in a vehicle;
4. A two wheeled vehicle, loaded or unloaded;
5. A four wheeled vehicle loaded or unloaded.

SEC. 12. The rate of tolls to be charged by the lessee, upon each item, or class specified in the last section. The basis, or unit of toll is the charge for a sheep, or hog, to be known as a single toll. For any animal described in subdivision two of such section, four such tolls may be charged. For any person described in subdivision three of such section, ten such tolls may be charged. For any vehicle described in subdivision four of such section, twenty such tolls may be charged. For any vehicle described in subdivision five of such section, forty such tolls may be charged.

SEC. 13. The order mentioned in section two, shall specify the number of gates to be placed on the road, the grade of the road, the materials of the construction thereof, and the period for which the same is to be let. The bid shall specify the unit or rate of toll upon a sheep or hog, which the bidder is willing to accept for keeping the road, and such bid shall be deemed a bid for tolls, as the other items or classes mentioned in section eleven, in the proportion of such unit, or rate, as specified in section twelve, section fourteen. Upon opening of the bids, the lease shall be awarded to the lowest bidder, having due reference to the fact of which of them is best qualified for the undertaking. The county court have the power, and it is their duty to reject any or all bids when there appears sufficient cause, and may subsequently re-offer, and let the same.

Passed the Senate, October 9, 1862.

WILSON BOWLBY,
President of the Senate.

Passed the House of Representatives, October 14, 1862.

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 15, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act districting the state into senatorial and represen'ative districts, and providing for the increase, and fixing the number of senators and representatives in the state legislative assembly.

SECTION 1. *Be it enacted by the legislative assembly of the state of Oregon,* That on and after the first Monday in June one thousand eight hundred and sixty-four, the senate shall consist of eighteen members and the House of representatives of thirty-seven members.

SEC. 2. That the ratio for the apportionment of this state into senatorial districts, shall be one senator for every three thousand and twenty-one, white population or fraction thereof, exceeding one-half in each senatorial district, and the ratio for the apportionment of this state into representative districts shall be, one representative for every one thousand five hundred and ten white population, or fraction thereof exceeding one-half in each representative district.

SEC. 3. The county of Marion shall constitute the first senatorial district, and shall be entitled to two senators; the county of Linn shall constitute the second senatorial district, and shall be entitled to two senators; the county of Lane shall constitute the third senatorial district, and shall be entitled to two senators; the counties of Douglas, Coos and Curry, shall constitute the fourth senatorial district, and shall be entitled to two senators jointly; the county of Jackson shall constitute the fifth senatorial district, and shall be entitled to one senator; The county of Josephine shall constitute the sixth senatorial district, and shall be entitled to one senator; the county of Benton shall constitute the seventh senatorial district, and shall be entitled to one senator; the county of Polk shall constitute the eighth senatorial district, and shall be entitled to one senator; the county of Yamhill shall constitute the ninth senatorial district, and shall be entitled to one senator; the counties of Washington, Columbia, Clatsop and Tillamook, shall constitute the tenth senatorial district, and shall be entitled to one senator jointly; the county of Multnomah shall constitute the eleventh senatorial district, and shall be entitled to one senator; the county of Clackamas shall constitute the twelfth senatorial district, and shall be entitled to one senator; the county of Wasco shall constitute the thirteenth senatorial district, and shall be entitled to one senator; the counties of Baker and Umatilla shall constitute the fourteenth senatorial district, and shall be entitled to one senator jointly.

SEC. 4. The county of Marion shall constitute the first representative district, and shall be entitled to four representatives; the county of Linn shall constitute the second representative district, and shall be entitled to four representatives; the county of Lane shall constitute the third representative district, and shall be entitled to three representatives; the county of Douglas shall constitute the fourth representative district, and shall be entitled to three representatives; the county of Jackson shall constitute the fifth representative district, and shall be entitled to three representatives; the county of Josephine shall constitute the sixth representative district, and shall be entitled to one representative; the counties of Coos and Curry shall constitute the seventh representative district, and shall be entitled to one representative jointly; the county of Benton shall constitute the eighth representative district, and shall be entitled to two representatives; the county of Polk shall constitute the ninth representative district, and shall be entitled to two representatives; the county of Yamhill shall constitute the tenth representative district, and shall be entitled to two representatives; the county of Washington shall constitute the eleventh representative district, and shall be entitled to two representatives; the counties of Columbia, Clatsop and Tillamook, shall constitute the twelfth representative district, and shall be entitled to one representative jointly; the county of Multnomah shall constitute the thirteenth representative district, and shall be entitled to three representatives; the county of Clackamas shall constitute the fourteenth representative district, and shall be entitled to three representatives; the county of Wasco shall constitute the fifteenth representative district, and shall be entitled to one representative; the county of Baker shall constitute the sixteenth representative district, and shall be entitled to two representatives; the county of Umatilla shall constitute the seventeenth representative district, and shall be entitled to one representative.

Passed the House of Representatives October 16, 1862.

JOEL PALMER,
Speaker House of Representatives.

Passed the Senate, October 16, 1862.

WILSON BOWLBY.
President of the Senate.

A bill to provide for the payment of the code commission and to continue the same.

Be it enacted by the legislative assembly of the state of Oregon, as follows:

SECTION 1. The secretary of state is hereby directed to audit and allow the claim of A. C. Gibbs, J. K. Kelly and M. P. Deady, in preparing the code reported to this legislature, at the rate of five dollars per day for each day actually engaged by them or either of them in such labor, and the account of each commissioner shall be verified by his own oath.

SEC. 2. That the sum of twelve hundred dollars, or so much thereof as may be necessary, be and the same is hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the payment of the services specified in section one of this act.

SEC. 3. That M. P. Deady be and he is hereby authorized to complete the code and report to the next session of the assembly.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

APPROVED, October 16, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act to provide for the publication of the laws and journals of this session of the legislative assembly, and their distribution and disposition.

Be it enacted by the legislative assembly of the State of Oregon, as follows:

SECTION 1. The general laws of this session of the legislative assembly shall be printed and published in a separate volume, and the special laws thereof, in the journal of the senate.

SEC. 2. Such general laws shall be printed in the manner and for the compensation now provided by law, except that the same shall be single leaded, and that the public printer shall receive twenty-five cents a copy for collating, stitching, covering and trimming the same; and is only required to print, publish and deliver the same to the secretary of state as soon as he conveniently can, not exceeding six months from the date of the final adjournment of this session of the legislative assembly.

SEC. 3. The secretary of state, nor other person, need not furnish copies of the laws or journals to the public printer, but may deliver to him from time to time as the same are needed for the purpose of being set up, and reading proof, the original manuscripts thereof, to be returned by such public printer without stain mutilation or erasure.

SEC. 4. The public printer is authorized and required to allow M. P. Deady to assist in and supervise the reading of the proof of the general laws.

SEC. 5. When delivered to the secretary of state, he shall distribute and dispose of the general laws in the manner and upon the terms provided in this section.

1. Send by mail a copy thereof to the governor of each of the loyal states, for the use of the library of such state.

2. Send by mail two copies to the office of the attorney general of the United States, and a like number to the library of the supreme court of the United States, and two copies to the library of the district court of the United States for this state.

3. On the application of the person entitled to deliver a copy to each member of the present legislative assembly, to each of the justices of the supreme court of this state, to the governor, secretary of state, and treasurer of state, to the county judge, county clerk, sheriff and treasurer of each county in this state, and to each justice of the peace in this state, in office, when the code of civil procedure takes effect, one copy to each prosecuting attorney in the state, and one copy to each member of the code commission; but the copies herein provided to be delivered, to public officers of this state except members of the assembly are to be deemed public property and shall be preserved and delivered to their successors in office.

4. Deposit thirty copies in the state library.

SEC. 6. The remaining copies, which it is estimated will be four hundred in number, the secretary of state shall sell to whoever may apply for them, at the full cost of printing them per copy with an addition of ten per cent thereon, and keep an account of the proceeds of such sales, and pay them over to the state treasurer monthly, and take his receipt therefor, less the amount of such ten per cent., which he is entitled to retain as full compensation for making such sales and paying over the proceeds thereof.

Passed the Senate October 14, 1862,

WILSON BOWLBY,
President of the Senate.

Passed House of Representatives October 16, 1862,

JOEL PALMER,
Speaker House Representatives.

APPROVED, October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

An act supplemental to an act to provide a code of civil procedure, and to repeal certain acts and sections of acts in conflict therewith.

Be it enacted by the legislative assembly of the state of Oregon, as follows:

SECTION 1. That the acts and sections of acts hereinafter enumerated be and the same are hereby repealed, namely:

An act to regulate proceedings in actions at law in the supreme and district courts. passed January the 7th, 1854.

An act to regulate actions relating to real property, passed December 22d, 1853.

An regulating proceedings to vacate charters and letters patent, and to prevent the usurpation of an office or franchise, passed December 22d, 1853.

An act relating to writs of mandamus, and prohibition, passed January 5th, 1854.

An act relating to actions on official securities, for fines and forfeitures, to actions by and against public officers and bodies, passed January 7th, 1854.

An act to regulate arbitrations, passed January 18th, 1854.

An act relating to the writ of habeas corpus, and proceedings thereon, passed January 5th, 1854.

An act relating to the qualifications of jurors and the mode of selecting them, passed January 10th, 1854.

An act for the limitation of actions passed January 6th, 1854.

An act to regulate proceedings in equity, passed January 23d, 1854.

Titles I and XVI, of chapter II, of an act relating to election of justices of the peace and constables, and to proceedings in justices' courts, passed January 12, 1854.

An act to establish a probate court and define its duties and powers, passed December 15th, 1853.

An act respecting executors, administrators, and the distribution of real and personal estate, passed December 14th, 1853. And an act amendatory of the same, passed January 31st., 1855.

Sections 6, 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 28, 29, 30, 31, 32, 33, 34, 49, and 52, of an act relating to wills, passed December 15th, 1853.

Section 38 of an act relating to estates in dower, by curtesy, and general provisions concerning real estates, passed January 16th, 1854, and the following is enacted in lieu thereof: "A tenant in common may maintain any proper action, suit, or proceeding against his co-tenant, for receiving more than his just proportion of the rents or profits of the estate owned by them in common; and joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common."

An act relating to counties, passed January 24th, 1854, except the 1, and 2, sections thereof.

An act relating to county commissioners, passed January 24th, 1854.

Sections 3 and 4, of an act relating to coroners, passed January 19th, 1854.

Sections 5, 6, 7, 9, 13, 14 and 20 of an act relating to sheriffs, passed January 31st, 1854.

An act to create and regulate the office of prosecuting attorney, passed January 26th, 1853, excepting sections 1, 2 and 3 thereof, and an act amendatory of such act, passed January 30th, 1855, excepting sections 1 and 6 thereof.

Section 27 of an act to regulate the fees of certain officers and other persons, passed January 19, 1855.

Sections 3, 4, and 11, of an act relating to county prisons, and their regulations, passed January 25th, 1854.

Section 26, and 37, and title II, of an act relating to alienation by deed, and the proof and recording of conveyances, and the cancelling of mortgages, passed Jannary 13th, 1854, and in lieu of such section 26, it is enacted as follows: "Every conveyance of real property within this state, hereafter made, which shall not be recorded as provided in this chapter, within five days thereafter, shall be void against any subsequent purchaser in good faith, and for a valuable consideration, of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

Sections 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, and 19, of an act relating to fraudulent conveyances, passed January 16th, 1854.

Section 2 of an act relating to seals, passed January 18th, 1854.

An act relating to marriage and divorce, passed January 17th, 1854.

An act to enlarge the powers of the clerks of the district and supreme courts, passed December 21st, 1855.

An act relating to jury fees, passed January 26th, 1856.

An act to conform the practice of the courts to the act of congress of August 16th, 1856, passed December 10th, 1856.

An act to amend an act to regulate proceedings in actions at law in the supreme and district courts, passed January 27th, 1857.

An act to provide for building bridges, passed January 10th, 1857, and an act amendatory thereof, passed January 15th, 1858.

An act to change the practice and fix the time for the holding of courts, passed January 17th, 1859, excepting sections 7, 8 and 9 thereof.

An act to organize county courts, and defining the jurisdiction and the duties of the judges thereof, approved June 4th, 1859.

An act relating to the qualification of jurors for the circuit court, and the mode of selecting them, approved June 2d, 1859.

An act to regulate the practice of the supreme and circuit courts, approved June 4th, 1859.

An act to defray expenses of holding terms of the supreme court, approved October 17th, 1860.

An act to authorize county clerks to appoint deputies, and to define their duties, approved October 18th, 1860.

Section 186 of an act relating to election of justices of the peace, and constables and to proceedings in justices courts, is repealed and in lieu thereof the following is enacted: "An appeal from a judgment given in a justice's court shall be taken within six months from the time the judgment is entered, and shall be by filing a notice of appeal with the justice, and serving a copy thereof on the adverse party or his attorney;" and title XIII., entitled "Forcible entry and detainer" of such act is also repealed, but the provisions of such title, giv[ing] the right to maintain an action for forcible entry upon lands, or unlawfully holding the same by force, and prescribing the defence thereto, are continued in force, and may be enforced in the county court according to the mode of proceeding in such court, as provided in the act to which this is a supplement.

Sec. 2. The provisions of the act to which this is a supplement, shall apply to and govern the proceedings in a criminal action or proceeding, so far as the same are not inapplicable.

Sec. 3. All actions, suits and proceedings pending when the act takes effect to which this is a supplement, shall thereafter be proceeded in according to the provisions of such act, and no rights vested or liabilities incurred when this act takes effect, shall be thereby lost or discharged.

Sec. 4. This act shall take effect and be in force at the same time that the act to which this is a supplement takes effect, and not otherwise.

Passed the Senate October 11, 1862.

WILSON BOWLBY,
President of the Senate.

Passed House of Representatives October 16, 1862.

JOEL PALMER,
Speaker House Representatives.

Approved October 17, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

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TO

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